149 US 30

# RECORD, CASE No. 13,773.

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## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1892.**

TERM NO., 183.

JOHAN PAULSEN, A. ALFREDS, J. J. ALLARD, ALFRED ANDERSON, ET AL., PLAINTIFFS IN ERROR,

*vs.*

THE CITY OF PORTLAND, JOHN GATES, MAYOR, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

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**FILED OCTOBER 15, 1889.**

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*vs.*

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 20, 1892.

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1 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the court-house, in the city of Portland, in said county and State, on Monday, the 3rd day of September, A. D. 1888, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court.

Present: In dep't No. 2, Hon. Loyal B. Sterns, judge presiding.

Whereupon a term of said court is begun and holden on Saturday, the 20th day of October, A. D. 1888, the same being the 42d judicial day of said term of said court, and, among other proceedings, the following was had, to wit:

JOHAN POULSEN *et al.*, Plaintiffs,
*vs.*
THE CITY OF PORTLAND *et al.*, Defendants.

Now, at this day, on motion of W. H. Adams, city attorney of said defendant, City of Portland, for leave to enter the mandate of the supreme court in the above-entitled suit, and for a decree for the costs and disbursements on the appeal therein, and for an order sustaining the demurrer to the amended complaint as directed therein, the court allows said motion and said mandate is hereby entered as follows:

*Mandate.*

2 Be it remembered that at a regular term of the supreme court of the State of Oregon, begun and held at the court-room, in the city of Salem, on the first Monday, the fifth day, of March, 1888—present, Hon. William P. Lord, chief justice; Hon. W. W. Thayer, associate justice; Hon. Reuben S. Strahan, associate justice, and W. H. Holmes, clerk—the following proceedings were had on Monday, the 2d day of July, 1888, the same being the 52d judicial day of said term:

JOHAN POULSEN, A. ALFREDS, J. J. ALLARD, ALFRED ANDERSON, F. A. Anderson, John Anderson (No. 1), John Anderson (No. 2), O. H. Anderson, C. R. Andricke, F. Buckmann, C. P. Bacon, George Bants, John Barrett, G. W. Bates, Sam. L. Beary, Mary E. Biles, Mrs. A. M. Bills, Mrs. A. E. Bills, F. Blied, L. Borrie, E. Bollam, Ellen Barbare, A. E. Borthwick, Otto Bourne, Mrs. S. E. Bradley, Thomas Brazel, P. E. Brigham, Mrs. Joseph Breckerhoff, Felicia Brown, H. Brown, J. Burnham, W. J. Burns, Thomas W. Burton, T. Callahan, D. F. Campbell, M. Campbell, Edward Campion, S. Carney, H. P. Christianson, J. Closset Conan, M. Connerton, M. Connerton, H. W. Corbett, Mary H. Couch, Geo. W. Cummings, William Dineen, T. Dineen, Chas. E. Dodd, John Dougherty, Annie E. Dowell, Fannie Dowell, A. Drange, Jerry Driscoll, A. Droix, Anna Mary Eskolla, Joseph Ewen, P. J. Fay, A. Ferrera, L. Fleishner, John R. Foster, William Frazier, William Frazier and L. P. W. Quimby, Tenants in Common, Assessed for the Pur-

pose of Taxation on the Books of the Defendant The City of Port-
land as Frazier & Quimby; R. D. Freeborn, M. Fried, Ellen
Gaffney, James Garson, J. K. Gill, L. W. Gilliland, D. Girard,
J. W. Going, Elizabeth Good, George Good, John Gorman,
William H. Gross, John Gustafson, N. H. J. Hammel, A. J.
Hanlan, Simon Harris, L. Hexter, L. N. Hilliland, Sol. Hirsch,
L. Hoffman, Maria Hornung, George W. Hoyt, R. Irving,
Mrs. S. Irving, Lena W. Jacobson, William Jacobson, Lilly
A. James, Lily A. James, Guardian of George V. James
3 *James*, an Insane Person; Joseph Jaskolla, Mary Jenkins,
T. Johnston, John Kiernan, R. B. Knapp, R. Knoll, Philip
Kohl, M. Koshland, J. Krumbien, Louis Larsen, Felix Laurant,
and Eugene Pierard, Tenants in Common, Assessed for the Pur-
pose of Taxation on the Books of the Defendant The City of Port-
land as Lorens & Pireard; George Lawrence, D. Lefever, C. Leon-
ard, C. H. Lewis, L. H. Lewis, Theo. H. Liebe, Engaged in Business
under the Firm Name of Theo. H. Liebe & Co.; W. L. Lightner,
Charles Logus, James Lotan, Mary Lowe, P. Lowengart, C. Madigan,
An. Manning, T. R. Manning, C. O. Maren, Sarah E. Marshall, Paul
Merrick, George Moore, John B. Morgan, Mary Mulvany, Honora
L. Murphy, John Murta, D. Mackay, P. McFeeley, Mary Mc-
Gowan, Catherine McGrath, Matilda C. McIntosh, Kenneth A. J.
McKenzie, Ryan S. McLeran and Frank W. McLeran, Partners
in Business as McLeran Brothers; Abbie McNeil, Maria Naucke,
C. W. Nelson, Marie Newstead, August Noffke, W. Noon, Emil
Nordstrom, The Norwegian-Danish Church, a Corporation Or-
ganized and Existing under the Laws of the State of Oregon and
Assessed for the Purpose of Taxation in the Books of the Defend-
ant The City of Portland as the Scandinavian Church; D.
O'Brien, Mrs. Mary T. O'Brien, Johanna O'Connor, Thomas
O'Connor, the Owner of Certain Property in the District Men-
tioned in the Complaint Assessed for the Purposes of Taxation in
the Books of the Defendant The City of Portland as the Prop-
erty of P. C. Smith; H. G. O'Neill, J. J. O'Neill, John F. O'Shea
and James B. O'Shea, Partners in Business under the Firm Name
of O'Shea Brothers; The Oregon Transfer Company, a Corpora-
tion Organized and Existing under the Laws of the State of Ore-
gon; Alex. E. Osmond, Catherine Osmond, Christiana Osmond,
A. J. Owen, P. L. Owen, Mary Perault, Johan Poulsen, Pat. Powers,
A. Prager, J. Prideaux, L. P. W. Quimby, Albert Rahles, J. P.
Rasmussen, Agnes Ried, E. J. Richards, Frank Richet, Thomas
Richet, and Thomas Richet, Jr., Partners in Business under the
Firm Name of Richet Brothers & Company; Mrs. Sarah
4 Rosenfeld, Anna S. Ryan, Louis Sethten, M. Sellers, J. F.
Shea, C. S. Sherer, P. H. Schulderman, J. Slaughterback,
George R. Smith, Mary A. Smith, Max Smith, Mary E. Spaulding,
W. W. Spaulding, M. M. Spaulding, and Thomas Papworth, Partners
in Business under the Firm Name of Spaulding & Papworth;
Joseph Spencer, James Steel, B. L. Stone, John Storan, L. Terry,
J. S. Thomas, Mrs. M. S. Thornton, C. Tockle, H. Trenkmann, Mary
B. Trevitt, D. S. Tuthill, Thomas Varwig, Fanny Wallace, H. W.

Wallace, John E. Walsh, P. Wassinger, A. Waterford, William Waterford, Geo. W. Weidler, H. Weinard, Thomas Whalen, John Wilhelm, The Willamette Steam Mill and Manufacturing Company, a Corporation Organized and Existing under the Laws of the State of Oregon; Anna M. Williams, Kate Williams, Mrs. C. E. Wilson, H. C. Wilson, J. K. Wilson, and Theodore Wygant, Respondents,

*vs.*

THE CITY OF PORTLAND, JOHN GATES, Mayor of said City; R. Gerdes, J. J. Gallagher, G. Castendeick, R. H. Schwab, S. Farrell, S. M. Forbes, Tyler Woodward, F. Hacheney, William Fliedner, and John Gates, Composing the Common Council of said City, and Samuel B. Parrish, Chief of Police of said City, Appellants.

This cause having been heretofore duly argued and submitted and taken under advisement by the court, and now the court, being fully advised as to all matters of law pertaining to the same, finds there is error as alleged.

It is therefore ordered and adjudged by the court that the judgment of the court below, from which this appeal was taken, be, and the same is hereby, reversed and set aside.

Further ordered that appellants recover of and from the respondents their costs and disbursements of this appeal herein, allowed and taxed at $157.70.

Further ordered that said cause be remanded to the court below with directions to said court to sustain the demurrer to the complaint, and for such other and further relief as may be consistent with the practice of said court, and that a judgment be there entered of record and docketed in accordance herewith.

5 STATE OF OREGON, } *ss:*
*Marion County,* }

I, W. H. Holmes, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record and in my office and custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Salem, Oregon, this 27th day of July, 1888.

[SEAL.] W. H. HOLMES, *Clerk.*

To the circuit court of the State of Oregon for the county of Multnomah:

Your are hereby commanded that of the above judgment — order of our supreme court you cause proper entry to be made upon the records of your court as of a judgment therein, and proceed to final determination and execution thereof as to said order of our supreme court and to law and justice shall appertain.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Oregon, at Salem, Oregon, this 27th day of July, 1888.

W. H. HOLMES,
[SEAL.] *Clerk of the said Supreme Court.*

6 *Journal Order.*

It is therefore ordered that the demurrer to the amended complaint herein be, and the same is hereby, sustained, and the plaintiffs are allowed ten days within which to file a further amended complaint.

It is further ordered and decreed that defendants do have and recover of and from the plaintiffs herein their costs and disbursements upon the appeal in said supreme court, taxed at $157.70, and that execution do issue therefor.

(Signed) LOYAL B. STEARNS, *Judge.*

7 [Endorsed:] No. —. In the supreme court of the State of Oregon, March term, 1888. Paulsen *et als. vs.* The City of Portland *et als.* Filed Oct. 20th, 1888. Jno. R. Duff, clerk, by A. N. Church, deputy.

8 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county-court house, in the city of Portland, in said county and State, on Monday, the 3d day of September, A. D. 1888, the same being the first Monday in said month and the time fixed by law for holding a regular term of said court.

Present: In department No. 2, Hon. Loyal B. Stearns, judge presiding.

Whereupon a term of said court is begun and holden on Saturday, the 17th day of November, A. D. 1888, the same being the 65th judicial day of said term of said court, and, among other proceedings, the following was had, to wit:

JOHAN POULSEN *et al.*, Plaintiffs,
*vs.*
THE CITY OF PORTLAND *et al.*, Defendants.

Now, at this time, on motion of W. H. Adams, attorney for defendants herein, for a decree dismissing the complaint herein and for costs and disbursements, it appearing that the time for filing an amended complaint has expired, and that no amended complaint has been filed herein, and that plaintiffs do not desire to file any amended complaint, it is ordered and decreed that the complaint herein be dismissed, and that defendants do have and recover of and from the plaintiffs herein their costs and disbursements of this suit, taxed at $—, and that execution do issue therefor.

(Signed) LOYAL B. STEARNS, *Judge.*

## 9 *Notice of Appeal.*

In the Circuit Court of the State of Oregon for Multnomah County.

JOHAN POULSEN, A. ALFREDS, J. J. ALLARD, ALFRED ANDERSON, JOHN Anderson No. 1, John Anderson No. 2, O. H. Anderson, F. A. Anderson, C. R. Andrichke, B. Backmann, C. P. Bacon, George Bants, John Barrett, G. W. Bates, Sam. L. Beary, John Berg, Mary E. Biles, Mrs. A. E. Bills, Mrs. A. M. Bills, F. Bleid, L. Boire, E. Bollam, Ellen Barbare, A. E. Borthwick, Otto Bourne, Mrs. S. E. Bradley, Thomas Brazel, P. E. Brigham, Mrs. Joseph Brinkerhoff, Felicia Brown, H. Brown, J. Burnham, W. J. Burns, Thomas W. Burton, T. Callahan, D. F. Campbell, M. Campbell, Edward Campion, S. Carney, H. P. Christiansen, J. Clossett, D. Coman, M. Connerton, M. Connerton, H. W. Corbett, Mary H. Couch, George W. Cummings, William Dineen, T. Dineen, Charles H. Dodd, John Dougherty, Anna E. Dowell, Fannie Dowell, A. Drange, Jerry Driscoll, A. Driver, A. Droix, Anna Mary Erkkolla, Joseph Ewen, P. J. Fay, A. Ferrera, L. Flieshner, John R. Foster, William Frazier, William Frazier and L. P. W. Quimby, Tenants in Common, Assessed for the Purpose of Taxation on the Books of the Defendant The City of Portland as Frazier & Quimby; R. D. Freeborn, M. Fried, Ellen Gaffney, James Garson, J. K. Gill, L. W. Gilliland, F. Gerard, J. W. Going, Elizabeth Good, George Good, John Gorman, William H. Gross, John Gustafson, N. J. Hammel, A. J. Hanlan, Simon Harris, L. Hexter, L. N. Hilliland, Sol. Hirsch, L. Hoffman, Marie Hornung, George W. Hoyt, R. Irving, Mrs. S. Irving, Lena W. Jacobson, William Jacobson, Lilly A. James, Lily A. James, Guardian of George V. James, an Insane Person; Joseph Jascolla, Mary Jenkins, T. Johnson, John Kiernan, R. B. Knapp, R. Knoll, Philip Kohl, M. Koshland, J. Krumbien, Louis Larsen, Felix Laurent and Eugene Pierard, Tenants in Common, Assessed for the Purpose of Taxation on the Books of the Defendant The City of Portland as Lorens & Pierard; George Lawrence, D. Lefevre,
10 C. Leonard, C. H. Lewis, L. H. Lewis, Theo. H. Liebe, Engaged in Business under the Firm Name of Theo. H. Liebe & Co.; W. L. Lightner, Charles Logus, James Lotan, Mary Lowe, P. Lowengart, C. Madigan, Ann. Manning, T. R. Manning, C. O. Maren, Sarah E. Marshall, Paul Merrick, George Moore, John B. Morgan, Mary Mulvany, Honora L. Murphy, John Murta, D. Mackay, P. McFeeley, Mary McGowan, Catharine McGrath, Matilda McIntosh, Kenneth A. J. McKenzie, Ryan S. McLearan and Frank McLearan, Partners in Business as McLearan Brothers; Abbie McNeil, Maria Naucke, O. W. Nelson, Maria Newstead, August Noffke, W. Noon, Emil Nordstrom, The Norwegian-Danish Church, a Corporation Organized and Existing under the Laws of the State of Oregon and Assessed for the Purpose of Taxation in the Books of the Defendant The City of Portland as the Scandinavian Church; D. O'Brien, Mrs. Mary T. O'Brien,

T. J. O'Brien, Johanna O'Connor, Thomas O'Connor, the Owner of Certain Property in the District Mentioned in the Complaint Assessed for the Purpose of Taxation in the Books of the Defendant The City of Portland as the Property of P. C. Smith; H. G. O'Neil, J. J. O'Neil, John F. O'Shea and James B. O'Shea, Partners in Business under the Firm Name of O'Shea Brothers; The Oregon Transfer Company, a Corporation Organized and Existing under the Laws of the State of Oregon; Alex. E. Osmond, Catherine Osmond, Christiana Osmond, A. J. Owen, P. L. Owen, Mary Perault, Johan Paulsen, Pat. Powers, A. Prager, J. Prideaux, L. P. W. Quimby, Albert Rahles, J. P. Rasmussen, Agnes Ried, E. J. Richards, Frank Richet, Thomas Richet, and Thomas Richet, Jr., Partners in Business under the Firm Name of Richet Brothers & Company; Mrs. Sarah Rosenfeld, Anna S. Ryan, Louis Sechstein, Louis Sechstein, M. Sellers, J. F. Shea, C. S. Sherer,
11 P. H. Schulderman, J. Slaughterback, George R. Smith, Mary A. Smith, Max Smith, Mary E. Spaulding, W. W. Spaulding, M. Spaulding and Thomas Papworth, Partners in Business under the Firm Name of Spaulding & Papworth; Joseph Spencer, James Steel, B. L. Stone, John Storan, L. Terry, J. S. Thomas, Mrs. M. S. Thornton, C. Tockle, H. Trenkmann, Mary B. Trevitt, D. S. Tutthill, Thomas Varwig, Fanny Wallace, H. W. Wallace, Carrie W. Wallace, W. R. Wallace, John E. Walsh, P. Wassinger, A. Waterford, William Waterford, Geo. W. Weidler, H. Weinard, Thomas Whalem, John Wilhelm, The Willamette Steam Mill, Lumbering and Manufacturing Company, a Corporation Organized and Existing under the Laws of the State of Oregon; Anna M. Williams, Kate Williams, Mrs. C. E. Wilson, H. C. Wilson, J. K. Wilson, and Theodore Wygant, Plaintiffs,

*vs.*

THE CITY OF PORTLAND, JOHN GATES, Mayor of said City; R. Gerdes, J. J. Gallagher, G. Castendeick, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hachemey, William Fliedner, and John Gates, Composing the Common Council of said City, and Samuel B. Parrish, Chief of Police of said City, Defendants.

To the above-named defendants and to Messrs. W. H. Adams and A. H. Tanner, their attorneys:

You and each of you will please take notice that the above-named plaintiffs in the above-entitled suit hereby appeals to the supreme court of the State of Oregon from the decree made and entered in the above-entitled suit in the above-entitled court on the 17th day of November, 1888, against the above-named plaintiffs in favor of the above-named defendants, decreeing that the plaintiffs' complaint herein be dismissed, and that the defendants do have and recover of and from the plaintiffs their costs and disbursements of this suit, taxed at $—, and that execution issue therefor, and from the whole and every part of said decree.

WILLIAMS & WOOD,
*Attorneys for Plaintiffs.*

12 Due services of the within notice of appeal by certified copy as prescribed by law is hereby admitted, at Portland, Or., February 13, 1889.

W. H. ADAMS,
*Attorney for Def'ts.*

13 [Endorsed:] No. 7954. In the circuit court of the State of Oregon for the county of Multnomah, department No. 2. Johan Poulsen *et al.*, plaintiffs, *vs.* The City of Portland *et al.*, defendants. Notice of appeal. Filed Feb'y 13th, 1889. Jno. R. Duff, clerk, by V. A. Fryer, deputy. Williams & Wood, attorneys for plaintiffs.

14 *Undertaking on Appeal.*

In the Circuit Court of the State of Oregon for the County of Multnomah.

JOHAN POULSEN *et al.*, Plaintiffs,
*vs.*
THE CITY OF PORTLAND *et al.*, Defendants.

Whereas the plaintiffs in the above-entitled suit have appealed to the supreme court of the State of Oregon from a decree made and entered against them in said suit in the above-entitled court, in favor of the defendants in said suit, on the 17th day of November, 1888, decreeing that the plaintiffs' complaint herein be dismissed, and that defendants do have and recover of and from plaintiffs their costs and disbursements of said suit, taxed at $—, and that execution issue therefor:

Now, therefore, in consideration of the premises and of such appeal, we, Johan Poulsen, as principal, and L. Therkelson, as surety, do hereby jointly and severally undertake on the part of the appellants that said appellants will pay all damages, costs, and disbursements which may be awarded against them on the appeal.

Dated Portland, Oregon, Feb. 13th, A. D. 1889.

JOHAN POULSEN. [SEAL.]
L. THERKLESEN. [SEAL.]

15 STATE OF OREGON,
*County of Multnomah,* } *ss:*

I, L. Therklesen, the person named in and who subscribed the foregoing undertaking as a surety thereto, being first duly sworn, for myself say that I am a resident and freeholder within said county and State and am worth the sum of $1,000.00 over and above all my debts and liabilities and exclusive of property exempt from execution.

L. THERKLESEN. [SEAL.]

Subscribed and sworn to before me this 13th day of Febr., A. D. 1889.

W. J. J. ROBERTS,
[SEAL.] *Notary Public in and for the State of Oregon.*

16 [Endorsed:] No. 7954. In the circuit court of the State of Oregon for the county of Multnomah, department No. 2. Johan Poulsen *et als.*, plaintiffs, *vs.* The City of Portland *et als.*, defendants. Undertaking on appeal. Filed February 13, 1889. Jno. R. Duff, clerk, by V. A. Fryer, deputy. Williams & Wood, attorneys for pl'ffs.

17 *Stipulation.*

In the Circuit Court of the State of Oregon for the County of Multnomah.

JOHAN POULSEN *et al.*
*vs.*
THE CITY OF PORTLAND *et al.*

It is hereby stipulated by and between the parties hereto, by their attorneys, that the transcript of the record sent to the supreme court of the State of Oregon on the former appeal and papers in file in said supreme court and now on file in the clerk's office of said supreme court may be used and considered a part of the transcript in this appeal from decree of November 17th, 1888, for all uses and purposes.

WILLIAMS & WOOD,
*Att'ys for Pl'ffs.*
W. H. ADAMS,
*City Attorney, of Attorneys for Defendants.*

18 [Endorsed:] Circuit court, State of Oregon, Multnomah county. Paulsen *et al. vs.* City of Portland. Stipulation. Filed Feb'y 23d, 1889. Jno. R. Duff, clerk, by V. A. Fryer, deputy.

19 STATE OF OREGON,
*County of Multnomah.*

I, Jno. R. Duff, clerk of the circuit court of the State of Oregon for the county of Multnomah, do hereby certify that the foregoing copies of mandate, decree, and stipulation, together with the notice of appeal, in the case of Johan Poulsen *et al.*, plaintiff- and appellants, *vs.* The City of Portland *et al.*, defendants and respondents, have been by me compared with the originals thereof, and that they are true and correct transcripts of such original mandate, decree, and stipulation and notice of appeal as the same appears of record at my office and in my custody.

[SEAL.] In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 2d day of March, A. D. 1889.

JNO. R. DUFF, *Clerk.*

20 In the Circuit Court of the State of Oregon for Multnomah County.

JOHAN POULSEN *et al.*, Plaintiffs & Appellants,
*vs.*
THE CITY OF PORTLAND *et al.*, Defendants & Respondents.

STATE OF OREGON,
*County of Multnomah.*

I, Jno. R. Duff, clerk of the circuit court of the State of Oregon for Multnomah county, do hereby certify that on the 13th day of February, 1889, Johan Paulsen *et al.*, the plaintiffs and appellants in the above-entitled cause, filed their undertaking on appeal in the sum of — dollars, with L. Therklesen as surety therein, conditioned that the said appellants will pay all damages, costs, and disbursements which may be awarded against them on the appeal.

And I further certify that said undertaking is given for an appeal and a stay of proceedings also.

[SEAL.] In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 2d day of March, A. D. 1889.

JNO. R. DUFF, *Clerk.*

21 Be it remembered that at a regular term of the supreme court of the State of Oregon begun and held at the courtroom, in the city of Salem, on the first Monday, the 4th day, of March, 1889—present, Hon. William Wallace Thayer, chief justice; Hon. Reuben S. Strahan, associate justice; Hon. William P. Lord, associate justice, and W. H. Holmes, clerk—the following proceedings were had on Wednesday, the 13th day of March, 1889, the same being the 7th judicial day of said term.

JOHAN POULSEN, A. ALFREDS, J. J. ALLARD, ALFRED ANDERSON, John Anderson No. 1, John Anderson No. 2, O. H. Anderson, F. A. Anderson, C. R. Andrichke, F. Backmann, C. P. Bacon, George Bants, John Barrett, G. W. Bates, Sam. L. Beary, John Berg, Mary E. Biles, Mrs. A. E. Bills, Mrs. A. M. Bills, F. Blied, L. Boire, E. Bollam, Ellen Barbare, A. E. Borthwick, Otto Bourne, Mrs. S. E. Bradley, Thomas Brazel, P. E. Brigham, Mrs. Joseph Brinckerhoff, Felicia Brown, H. Brown, J. Burnham, W. J. Burns, Thomas W. Burton, T. Callahan, D. F. Campbell, M. Campbell, Edward Campion, S. Carney, H. P. Christiansen, J. Clossett, D. Coman, M. Connerton, M. Connerton, H. W. Corbett, Mary H. Couch, George W. Cummings, William Dineen, T. Dineen, Charles H. Dodd, John Dougherty, Anna E. Dowell, Fannie Dowell, A. Drange, Jerry Driscoll, A. Droix, Anna Mary Errkola, Joseph Ewen, P. J. Fay, A. Ferrera, L. Fleishner, John R. Foster, William Frazier, William Frazier and L. P. W. Quimby, Tenants in Common, Assessed for the Purpose of Taxation on the Books of the Defendant The City of Portland as Frazier & Quimby; R. D. Freeborn, M. Fried, Ellen Gaffney, James Garson, J. K. Gill, L.

W. Gilliland, D. Gerard, J. W. Going, Elizabeth Good, George Good, John Gorman, William H. Gross, John Gustafson, N. J. Hammel, A. J. Hanlan, Simon Harris, L. Hexter, L. N. Hilliland, Sol. Hirsch, L. Hoffman, Maria Hornung, George W. Hoyt, R. Irving, Mrs. S. Irving, Lena W. Jacobson, William Jacobson, Lily A. James, Lily A. James, Guardian of George V. James, an Insane Person; Joseph Jaskolla, Mary Jenkins, T. Johnson, John Kiernan, R. B. Knapp, R. Knoll, Philip Kohl, M. Koshland, J. Krumbein, Louis Larsen,
22 Felix Laurant and Eugene Pierard, Tenants in
Common, Assessed for the Purpose of Taxation on the Books of the Defendant The City of Portland as Lorens & Pierard; George Lawrence, D. Lefever, C. Leonard, C. H. Lewis, L. H. Lewis, Theo. H. Liebe, Engaged in Business under the Firm Name of Theo. H. Liebe & Company; W. L. Lightner, Charles Logus, James Lotan, Mary Lowe, P. Lowengart, C Madigan, Ann Manning, T. R. Manning, C. O. Maren, Sarah E. Marshall, Paul Merrick, George Moore, John B. Morgan, Mary Mulvany, Honora L. Murphy, John Murta, D. Mackay, P. McFeeley, Mary McGowan, Catherine McGrath, Matilda McIntosh, Kenneth A. J. McKenzie, Ryan S. McLeran and Frank McLeran, Partners in Business as McLeran Brothers; Abbie McNeil, Maria Naucke, O. W. Nelson, Maria Newstead, August Noffke, W. Noon, Emil Nordstrom, The Norwegian-Danish Church, a Corporation Organized and Existing under the Laws of the State of Oregon and Assessed for the Purpose of Taxation on the Books of the Defendant The City of Portland as the Scandinavian Church; D. O'Brien, Mrs. Mary T. O'Brien, T. J. O'Brien, Johanna O'Connor, Thomas O'Connor, the Owner of Certain Property in the District Mentioned in the Complaint, Assessed for the Purpose of Taxation on the Books of the Defendant The City of Portland as the Property of P. C. Smith; H. G. O'Neill, J. J. O'Neill, John F. O'Shea and James B. O'Shea, Partners in Business under the Firm Name of O'Shea Brothers; The Oregon Transfer Company, a Corporation Organized and Existing under the Laws of the State of Oregon; Alex. E. Osmond, Catherine Osmond, Christiana Osmond, A. J. Owen, P. L. Owen, Mary Perrault, Johan Poulsen, Pat. Powers, A. Prager, J. Prideaux, L. P. W. Quimby, Albert Rahles, J. P. Rasmussen, Agnes Reid, E. J. Richards, Frank Richet, Thomas Richet, and Thomas Richet, Jr., Partners in Business under the Firm Name of Richet Bros. & Company; Mrs. Sarah Rosenfeld, Anna S. Ryan, Louis Sechstein, Louis Sechstein, M. Seller, J. F. Shea, C. S. Sherer, P. H. Schulderman, J. Slaughterback, George R. Smith, Mary A. Smith, Max Smith, Mary E. Spaulding, W. W. Spaulding,
23 M. M. Spaulding and Thomas Papworth, Partners in Business
under the Firm Name of Spaulding & Papworth; Joseph Spencer, James Steel, B. L. Stone, John Storan, L. Terry, J. S. Thomas, Mrs. M. S. Thornton, C. Tockle, H. Trenkmann, Mary B. Trevitt, D. S. Tutthill, Thomas Varwig, Fanny Wallace, H. W. Wallace, Carrie W. Wallace, W. R. Wallace, John E. Walsh, P. Wassinger, A. Waterford, William Waterford, Geo. W. Weid-

ler, H. Weinard, Thomas Whalen, John Wilhelm, The Willamette Steam Mill, Lumbering and Manufacturing Company, a Corporation Organized and Existing under the Laws of the State of Oregon ; Anna M. Williams, Kate Williams, Mrs. C. E. Wilson, H. C. Wilson, J. K. Wilson, and Theodore Wygant, Apellants,

*vs.*

THE CITY OF PORTLAND, JOHN GATES, Mayor of said City ; R. GERDES, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hacheney, William Fliedner, and John Gates, Composing the Common Council of said City, and Samuel B. Parrish, Chief of Police of said City, Respondents.

Now, at this day, comes Williams & Wood, of counsel for appellants, and Adams & Tanner, of counsel for respondents. Said cause came on for hearing upon all matters of error disclosed by the transcript and is duly argued by said counsel respectively and submitted to the court, and the court, being fully advised in the premises, finds there is not error as alleged.

It is therefore ordered and adjudged by the court that the judgment of the court below, from which this appeal was taken, be, and the same is, in all things affirmed, and further ordered that respondents recover of and from the appellants and L. Therklesen, their surety on appeal, their costs and disbursements of this appeal herein, allowed and taxed at $—, and that said cause be remanded to said court below, and that a judgment be there entered of record and docketed in accordance herewith.

24 [Endorsed :] No. —. In the supreme court of the State of Oregon. Appeal from Multnomah county. Johan Poulsen *et al.*, plaintiffs and appellants, *vs.* The City of Portland *et al.*, defendants and respondents. Transcript. Filed March 4, 1889. W. H. Holmes, clerk.

25 JOHAN POULSEN *et al.*
*vs.*
THE CITY OF PORTLAND *et al.*

*Transcript.*

26 (Index omitted here in printing. See general index.)

*Amended Complaint.*

In the Circuit Court of the State of Oregon for the County of Multnomah.

JOHAN PAULSEN *et al.*, Plaintiffs,
*v.*
THE CITY OF PORTLAND, JOHN GATES, Mayor of said City; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Shwab, S. Farell, C. M. Forbes, Tyler Woodward, F. Hacheney, William Fliedner, and John Gates, Composing the Common Council of said City, and Samuel B. Parrish, Chief of Police of said City, Defendants.

A. Alfreds, J. J. Allard, Alfred Anderson, A. Anderson, John Anderson (No. 1), John Anderson (No. 2), O. H. Anderson, C. R. Andreichke, F. Backmann, C. P. Bacon, George Bants, John Barrett, G. W. Bates, Sam. L. Beary, John Berge, Mary E. Biles, Mrs. A. E. Biles, Mrs. A. M. Biles, F. Blied, L. Boire, E. Bollam, Ellen Barbare, A. E. Borthwick, Otto Bourne, Mrs. S. E. Bradley, Thomas Brazel, P. E. Brogham, Mrs. Joseph Brinckerhoff, Felicia Brown, H. Brown, J. Burnham, W. —. Burns, Thomas W. Burton, T. Callahan, D. F. Campbell, M. Campbell, S. Carney, Edward Champion, H. P. Christianson, J. Clossett, D. Commah, M. Connertin, M. Connertin, H. W. Corbett, Mary H. Couch, George W. Cummings, William Dineen, T. Dineen, Charles H. Dodd, John Dougherty, Anna E. Dowell, Fannie Dowell, A. Drange, Jerry Driscoll, A. Driver, Anna Mary Erkkola, Joseph Ewen, P. J. Fay, A. Ferrara, L. Fleishner, John R. Foster, William Frasier, William Frazier and L. P. W. Quimby, tenents in common, assessed for the purpose of taxation on the books of the defendant The City of Portland as
27 Frazier & Quimby; R. D. Freeborn, M. Fried, Ellen Gaffney, James Garson, J. K. Gill, L. W. Gilliland, D. Girard, J. W. Going, Elizabeth Good, George Good, John Gorman, William H. Gross, John Gustafson, N. J. Hammel, A. J. Hanlan, Simon Harris, L. Hexter, L. N. Hilliland, Sol. Hirsch, L. Hoffman, Maria Hornung, George W. Hoyt, R. Irving, Mrs. S. Irving, Lena W. Jacobson, William Jacobson, Lily A. James, Lily A. James, guardian of George V. James, an insane person; Joseph Jackolla, Mary Jenkins, T. Johnston, John Kiernan, R. B. Knapp, R. Knoll, Philip Kohl, M. Koshland, J. Krumbien, Louis Larsen, Felix Laurant and Eugene Peirard, tenants in common, assessed for the purpose of taxation on the books of the defendant The City of Portland as Lorens & Pierard; Geroge Lawrence, D. Lefever, C. Leonard, C. H. Lewis, L. H. Lewis, Theo. H. Lieb, engaged in business under the firm name of Theo. H. Liebe & Co.; W. L. Lightner, Charles Logust, James Lotan, Mary Lowe, P. Lowengart, C. Madigan, Ann Manning, T. R. Manning, C. O. Maren, Sarah E. Marshall, Paul Merrick, George Moore, John B. Morgan, Mary Mulvaney, Honorah L. Murphy, John Murta, D. Mackay, P. McFeeley, Mary McGowan,

Catherine McGrath, Matilda C. McIntosh, Kenneth A. J. McKensie, Ryan S. McLearin and Frank W. McLearin, partners in business as McLearin Brothers; Abbie McNeil, Marie Naunke, O. W. Nelson, Marie Newstead, August Noffke, W. Noon, Emil Nordstrom, The Norwegian-Danish Church, a corporation organized and existing under the laws of the State of Oregon and assessed for the purposes of taxation on the books of the defendant The City of Portland as the Scandinavian Church; D. O'Brien, Mrs. Mary T. O'Brien, T. J. O'Brien, Johanna O'Connor, Thomas O'Connor, the owner of certain property in the district hereinbefore mentioned, assessed for the purpose of taxation on the books of the defendant
28 The City of Portland as the property of P. C. Smith; H. G. O'Neill, J. J. O'Neill, John F. O'Shea and James B. O'Shea, partners in business under the firm name of O'Shea Brothers; The Oregon Transfer Company, a corporation organized and existing under the laws of the State of Oregon; Alex. B. Osmond, Catherine Osmond, Christiana Osmond, A. J. Owens, P. L. Owens, Mary Perault, Johan Paulsen, Pat. Powers, A. Prager, F. Prideaux, L. P. W. Quimby, Albert Rahlest, J. P. Rasmussen, Agnes Ried, E. J. Richards, Frank Richet, Thomas Richet, and Thomas Richet, Jr., partners in business under the firm name of Richet Brothers & Company; Mrs. Sarah Rosenfield, Anna S. Ryan, Louis Sechstein, M. Sellers, J. F. Shea, C. S. Shearer, P. H. Schulderman, J. Slaughterback, George R. Smith, Mary A. Smith, Max Smith, Mary E. Spaulding, W. W. Spaulding, M. M. Spaulding, and Thomas Papworth, partners in business under the firm name of Spaulding & Papworth; Joseph Spencer, James Steel, B. L. Stone, John Sterah, L. Terry, J. S. Thomas, Mrs. M. S. Thornton, C. Tochle, H. Trenkman, Mary B. Tresett, D. S. Tuthill, Thomas Varwig, Fanny Wallace, H. W. Wallace, Carrie W. Wallace, W. R. Wallace, John E. Walsh, P. Wassinger, A. Waterford, William Waterford, George Weidler, H. Weinhard, Thomas Whalen, John Wilhelm, The Willamette Steam Mills, Lumbering & Manufacturing Company, a corporation organized and existing under the laws of the State of Oregon; Anna M. Williams, Kate Williams, Mrs. C. E. Wilson, H. C. Wilson, J. K. Wilson, and Theodore Wygant, the plaintiffs herein, sue for themselves and for all others in interest who may join with them in this suit at any time prior to its termination, and said plaintiffs are joined as such plaintiffs as having a common interest in the subject of this suit, and to prevent a multiplicity of suits.

29 And said plaintiffs and each of them file this as their amended complaint to said cause, by leave of the court first obtained, and for cause of suit complain against the said defendants jointly and separately and allege as follows:

## I.

During all the times herein mentioned said Lily A. James was and now is the duly appointed and qualified and acting guardian of the said George V. James, an insane person.

During all the times herein mentioned said Theo. H. Liebe was and now is engaged in business under the firm name of Theo. H. Liebe & Co.

During all the times herein mentioned said Ryan S. McLearin and Frank W. McLearin were and now are partners, doing business under the firm name of McLearin Brothers.

During all the times herein mentioned the said Norwegian-Danish church was and now is a corporation duly organized and existing under the laws of the State of Oregon.

During all the times herein mentioned said John F. O'Shea and James B. O'Shea were and now are partners, doing business under the firm name of O'Shea Brothers.

During all the times herein mentioned the said Oregon Transfer Company was and now is a corporation duly organized and existing under the laws of the State of Oregon.

During all the times herein mentioned the said Frank Richet, Thomas Richet, and Thomas Richet, Jr., were and now are partners, doing business under the firm name of Richet Brothers & Company.

During all the times herein mentioned the said M. M. Spaulding and Thomas Papworth were and now are partners, doing business under the firm name of Spaulding & Papworth.

30 During all the times herein mentioned the said Willamette Steam Mill, Lumbering & Manufacturing Company was and now is a corporation duly organized and operating under the laws of the State of Oregon.

During all the times herein mentioned the defendant The City of Portland was and now is a municipal corporation, chartered and existing under and by virtue of the laws of the State of Oregon.

During all the times herein mentioned the defendant John Gates was and now is the duly elected, qualified, and acting mayor of the said city of Portland and *ex officio* a member of the common council of the said city.

During all the times herein mentioned the defendants R. Gerdes, J. S. Gallagher, G. Castendieck, R. H. Shwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hacheney, and William Fliedner composed and now compose the duly elected, qualified, and acting common council of the said city of Portland.

During all the times herein mentioned the defendant Samuel B. Parrish was and now is the duly appointed, qualified, and acting chief of police of the said city of Portland.

## II.

Heretofore, to wit, on the — day of ——, 1887, the defendant the said City of Portland, by its said common council, passed an ordinance, numbered 5068 and approved on the 5th day of March, 1887, which ordinance, for greater certainty, is hereto appended as Appendix A, and is referred to and made a part of this amended complaint. A map of the district bounded and described in said ordinance is also filed herewith as Appendix D, and is referred to and made a part of this amended complaint.

31 The viewers appointed by the said ordinance, to wit: R. L. Durham, Charles G. Schram, and H. W. Monastes, reported to the said common council on July 2d, 1887, their estimate of the proportionate share of the cost of said sewer (commonly called the Tanner Creek sewer) to be assessed, respectively, against the several parcels of property lying within the said district.

Thereafter, to wit, on August 17, 1887, the said defendant The City of Portland, by its said common council, passed an ordinance numbered 5162 and approved on August 19, 1887, which ordinance, for greater certainty, is hereto appended as Appendix B, and is referred to and made a part of this amended complaint.

Thereafter, in accordance with the provisions of the said ordinance numbered 5162, the said auditor and clerk of the city of Portland did docket said assessments and taxes against the several parcels of property, respectively, lying and situated in said district, and said assessments and taxes now remain and appear of record as liens on and against the several parcels of property respectively, although in fact said assessments, taxes, and charges are not valid liens against said property or any part thereof.

Thereafter, to wit, on August 17, 1887, the said defendant The City of Portland, by its said common council, passed an ordinance numbered 5164 and approved on August 19, 1887, which ordinance, for greater certainty, is hereto appended as Appendix C, and is referred to and made a part of this amended complaint.

Thereafter, in accordance with the provisions of the said ordinances numbered 5162, the said auditor and clerk of the city of Portland did docket said assessments and taxes against the several parcels of property, respectively, lying and situated in said district, and said assessment and taxes now remain and appear of record as liens on and against the said several parcels of property respectively, although in fact said assessments, taxes, and charges are not valid liens against said property or any part thereof.

32 Thereafter, to wit, on August 17th, 1887, the said defendant The City of Portland, by its said common council, passed an ordinance numbered 5164 and approved on August 19, 1887, which ordinance, for greater certainty, is hereto appended as Appendix C, and is referred to and made a part of this amended complaint.

Thereafter, to wit, on Nov. 22, 1887, said defendant The City of Portland, by its said common council, issued warrants for the collection of said assessments or taxes or appropriations as aforesaid; which warrants were by said city of Portland placed and now remain in the hands of the defendant Samuel B. Parrish, as chief of police of said city of Portland. In and by said warrants said chief of police was warranted, empowered, and directed to collect said taxes or assessments, levied and assessed as aforesaid, from each and all of the holders, respectively, of said parcels of property in said district, in the sums severally and respectively assessed against them as aforesaid; and in case payment be refused or for any cause be in default, to sell any and all of said property as to which such assessment was or is refused to be paid or is in default, and to return the sums so realized into the hands of the city treasurer, to be applied in payment of the assessment or taxes aforesaid, respectively; and the said defendant Samuel B. Parrish, as chief of police as aforesaid, now threatens and is attempting to collect said assessments or taxes, and threatens to and will, unless restrained by this honorable court, sell said property as aforesaid.

## III.

The sums apportioned to the various lots and blocks, respectively, in the aforesaid district by said viewers, and assessed against the said property by the said ordinance numbered 5162, and especially the sums so apportioned against the property of these plaintiffs and of each of them, as set forth in the schedule of property in said ordinance numbered 5162, and as presented in said map,
33 Appendix D hereto, were and are unconstitutional, illegal, and void for the reason, among others:

1. That said sums do not truly or at all represent the benefits received by the several parcels of property against which they are respectively assessed, and especially the property of these plaintiffs as aforesaid, from the construction of the said Tanner Creek sewer.

2. That plaintiffs' said property has not been and will not be benefited, nor any part of the same, by the construction of said Tanner Creek sewer.

3. That certain of said lots and blocks in greatly varying localities and varying in value, to wit, from five hundred dollars to ten thousand dollars, have each and all of them been assessed at one uniform valuation of benefit, and certain other of said lots and blocks of uniform value among themselves have been assessed at different, varying, and disproportionate valuations of benefit, as will appear by reference to said map, Appendix D hereto, wherein said assessments are indicated as follows:

All parcels of land assessed as aforesaid at the rate of eighteen dollars and seventy-five cents per lot are colored red.

All parcels of land assessed as aforesaid at the rate of eleven dollars and twenty-five cents per lot are colored green.

All parcels of land assessed as aforesaid at the rate of sixteen dollars and twenty-five cents per lot are collored yellow.

All parcels of land assessed as aforesaid at the rate of twenty-six dollars and twenty-five cents per lot are marked with a red ball.

All parcels of land assessed as aforesaid at the rate of twenty-one dollars and twenty-five cents per lot are marked with a blue ball.

All parcels of land assessed as aforesaid at the rate of six dollars and twenty-five cents per lot are marked with a green ball.

All parcels of land assessed as aforesaid at the rate of twenty dollars per lot are marked with a red square.

34 All parcels of land not assessed at all as aforesaid are marked with a red cross.

4. The general dimensions of regular blocks in said district are two hundred by two hundred feet, except as to the double blocks, which are 460 feet in length by 200 feet in width, and the streets in

said district are of the general width of sixty feet; all of which is more particularly and accurately described and set out in said map, Appendix D hereto, and which is a true and correct map of said district, drawn according to the scale of measurement on said map delineated. Heretofore at various times, to wit, since the year 1880, other sewers have been constructed in or adjacent to the said district and now remain in use and operation, to wit:

On B street, from about 12th street to the Willamette river.
On C street, from 12th street to the Willamette river.
On D street, from Seventeenth street to the Willamette river.
On E street, from 21st street to the Willamette river.
On F street, from 18th street to the Willamette river.
On G street, from 18th street to the Willamette river.
On B street, from 21st street, to connect with the said Tanner Creek sewer.

Certain of the property already assessed as aforesaid within the said district, to wit, all property lying within one hundred and thirty feet on either side of the line of any one or more of said last-described sewers, has been or is liable to be assessed or has already paid such assessment for the construction of one or more of said last-described sewers.

5. Certain of said parcels of property within the said district assessed as aforesaid for the construction of the said Tanner Creek sewer are at a level so low that it is impracticable to drain the same into said sewer.

6. Certain parcels of property within the said district were not assessed at all for the construction of said Tanner Creek sewer, but are wholly omitted from said assessments.

## IV.

Said ordinance numbered 5068, approved March 5th, 1887, is unconstitutional and void, in this:

35 § 121 of chapter 10 of the charter of the said city of Portland, providing for the construction of sewers, under and by virtue of which said ordinance numbered 5068 was passed, is in violation of the 14th amendment to the Constitution of the United States, as it provides for taking private property for public use without due process of law; and said ordinance numbered 5068 is also unconstitutional and void, as it determines arbitrarily and absolutely that the property therein described is benefited by said Tanner Creek sewer without giving to the owners of said property any notice or opportunity to be heard upon that question. Said ordinance numbered 5162, approved August 19, 1887, is unconstitutional and void upon the same grounds as those upon which said ordinance numbered 5068 is unconstitutional and void as aforesaid, and also because said ordinance numbered 5162 provides for an assessment of the property therein named for the construction of said Tanner Creek sewer without providing for any notice to the owners whose property is therein and thereby assessed.

Said ordinances and each of them and said assessment were and are unconstitutional, illegal, and void because—and these plaintiffs aver the fact to be as now stated—plaintiffs had not nor had any of them any notice of the said proceedings of the said common council or any opportunity to be heard as to whether or not their property or the property of any of them was or could be benefited by said sewer, or as to the amount that was or should be assessed upon the several parcels of property named in said ordinance numbered 5162.

Said ordinances and each of them and said assessment were and are illegal and void for the reason—and these plaintiffs aver the fact to be—that said common council and the said viewers and each of them knew that a large proportion of the property described in said ordinances, including the property of these plaintiffs, was and is a long distance away from said Tanner Creek sewer and never
would or could be benefited by said sewer, and that a consid-
36 erable portion of said property was lower in elevation than
the bottom of said sewer, and that it was physically impossible for said property to be drained into said sewer or to be benefited by it in any way.

And said ordinances and assessment and each of them were and are a gross abuse of power by said common council and in fraud of the rights of these plaintiffs.

Said assessment is illegal and void and in violation of § 121 of chapter 10 of the charter of the said city of Portland because—and these plaintiffs aver the fact to be—that said assessment was not made upon the property directly benefited by said sewer, but was made indiscriminately upon a large section of the city of Portland and without reference to the benefits to the property therein contained.

## V.

Plaintiffs and each of them, as well as others not herein named as parties plaintiff, at all the times herein mentioned, were and still are the owners and holders of real property within the district aforesaid, to wit, lots and blocks and fractions thereof—a more particular description of the said respective holdings of plaintiffs being contained in the schedule of property assessed, marked Appendix B and filed herewith, and the map also filed herewith, marked Appendix D, both of which are again hereby referred to.

## VI.

Said charges or assessments docketed in the docket of city liens as aforesaid unlawfully encumber the titles which plaintiffs have in and to said property respectively, and if said charges be permitted to so remain and encumber said titles or any of them, or if said taxes so levied as aforesaid be collected, or if any attempt be made to collect the same, or to sell said property or any part thereof as aforesaid, plaintiffs will suffer great and irreparable damage and injury.

37 And for the existing and threatened injuries to their respective rights, as hereinbefore set forth, plaintiffs have no plain, speedy, adequate, and complete remedy at law.

Wherefore plaintiffs and each of them pray that this honorable court will be pleased to temporarily restrain and permanently enjoin the defendants and each of them, and especially the defendant Samuel B. Parrish, chief of police of the said city of Portland, from proceeding further in the premises, and especially from collecting or attempting to collect any of the taxes or assessments levied or made against the property of these plaintiffs or any of them to aid towards the payment for the construction of the said Tanner Creek sewer or any part thereof, and to order and decree that the entries of all charges against any of the property of these plaintiffs or any of them on account of any assessment or assessments for the payment for the construction of the said Tanner Creek sewer or any part thereof, made in the docket of city liens as aforesaid, be cancelled and annulled; and for such other, different, and further relief as to this honorable court may seem equitable and meet in the premises.

WILLIAMS & WOOD AND
S. B. LINTHICUM,
*Att'ys for Plaintiffs.*

38 STATE OF OREGON,
*County of Multnomah,* } *ss:*

I, Johan Poulsen, being first duly sworn, on my oath say that I am one of the plaintiffs named in the foregoing amended complaint; that I know the contents of said amended complaint, and that said amended complaint is true as I verily believe.

JOHAN POULSEN.

Subscribed and sworn to before me this 3d day of February, 1888.

J. C. FLANDERS,
[SEAL.] *Notary Public in and for Oregon.*

39 POULSEN
*v.*
THE CITY.

*Ordinance No.* 5068.

APPENDIX A.

40 *Ordinance No.* 5068.

An ordinance providing for the time and manner of constructing a sewer, together with the necessary catch-basins, man-holes, and lamp-holes and branches along Tanner creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, thence along North Eighth street to North Front street and thence northeasterly to low water in the Willamette river, and describing the district to be drained by said sewer, which said sewer shall be paid for by the property benefited by the construction thereof, as provided by section 121 of the city charter.

The city of Portland does ordain as follows:

SECTION 1. The proposed sewer along Tanner creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street and thence along North Eighth street to North Front street and thence northeasterly to low water in the Willamette river, for the purpose of sewering and draining the streets and property within the district hereinafter designated shall be completed as hereinafter provided, within two hundred and fifty days from the date of signing the contract for the construction of the said sewer by the parties to said contract.

SEC. 2. That portion of any street or the portions of any private or public lands necessary to be used for digging the trench for said sewer or laying and constructing the same shall be cleared of all obstructions and obstacles (except gas and water mains) at the expense of the contractor who shall after the pipe is laid and the trench filled, at his own cost and expense replace the pavement and all portions of the street improvements of earth or land disturbed leaving such street and lands in as good order and condition as the same was when the work was begun, except such portions as the committee on streets and public property may direct to be omitted for the purpose of making other improvements.

SEC. 3. The sewer by this ordinance ordered to be constructed and laid down for the purpose of draining and sewering the streets and property within the limits designated in section 5 of this ordinance shall consist of a brick sewer with eight-inch walls, circular in form and having a clear inside diameter of six feet, along Tanner creek from the end of the present brick sewer under B street to the north end of the present brick sewer under D street, except for a distance of 184 feet southerly from the south end of the present brick sewer under D street, it will consist of a redwood, iron-bound circular sewer five feet in diameter, and from the north end of the present brick sewer under D street to low water in the Willamette river said sewer shall have ovoid walls, having a vertical diameter of seven and two-thirds feet, an upper transverse diameter of five and one-third feet and a lower transverse diameter of thirty inches. The course and location of the sewer, the construction of which is provided for by this ordinance shall be as follows: Beginning at the northerly end of the present brick sewer under B street at North Fourteenth street, to wit: At a point one hundred and one and one-half ($101\frac{1}{2}$) feet northerly from the north line of B street, and forty-four (44) feet easterly from the east line of North Fourteenth street, and running thence as nearly as practical in a straight line to the southerly end of the wooden sewer on block No. 92 in Couch's addition to the city of Portland; thence following the course and location of said wooden sewer and the said brick sewer under D street to the northerly end thereof; thence to wit, from a point on block No. 84 in Couch's addition to the city of Portland, which is twenty-seven feet northerly from the north line of D street and twenty feet easterly from the east line of North Twelfth street, in a straight line to a point on the south line of E street at the distance of fifteen feet westerly from the west line of North Eleventh street; thence in a straight line to a point twenty feet south and ten feet west of the center of the intersection of North Tenth and H streets; thence in a straight line to a point ten feet west of the center of the intersection of North Tenth and I streets; thence in a straight line to a point ten feet east of the center of the intersection of North Eighth and I streets; thence northerly along a line ten feet east of the center line of North Eighth street to the center line of North Front street; and thence northeasterly at right angles to North Front street, to low water in the Willamette river; provided, that the turns in the course of said sewer at North Tenth and I streets, and at North Eighth and I streets shall be made on a curve described with a radius of one hundred feet, and all other turns shall conform to a curve described with a radius of two hundred feet.

Sec. 4. All of the sewer herein ordered to be constructed shall be provided with catch-basins, lamp-holes, man-holes and branches for side sewers, so that the main sewer in this ordinance provided for shall be made the main sewer for draining and sewering the streets and property within the district described and the boundaries defined in section five (5) of this ordinance, at the points and in the manner designed in the plans and specifications therefor hereinafter mentioned, and the work to be done and materials to be furnished shall be strictly in accordance with the specifications therefor, entitled, "Tanner creek sewer specifications and general conditions," signed by the superintendent of streets and filed in the office of the auditor and clerk of the city of Portland April 20, 1887, which said plans and specifications are hereby adopted and declared to be the plans and specifications for the sewer provided for in this ordinance; provided that the top of the sewer herein provided for shall not at any place be less than eight (8) feet below the grade of the street;

and provided further, that the grade of the said sewer shall be established by the city surveyor and superintendent of streets.

SEC. 5. The streets and property within the district bounded and described as follows shall be sewered and drained into the Willamette river through the sewer in this ordinance provided and ordered to be constructed along Tanner creek and North Eighth street, from B street, near the intersection of North Fourteenth street to the Willamette river, to wit: Beginning at a point on a low-water line of the Willamette river, in the city of Portland, in Multnomah county, in the State of Oregon, which is due northeast from the point where the center line of North Fourth street, if extended northerly, would intersect the westerly side line of North Front street, and running thence southwest to the westerly side line of North Front street, thence south along the center line and such continued center line of North Fourth street to a point one hundred (100) feet southerly from the south line of H street; thence westerly along a line parallel with and one hundred feet southerly from the south line of H street to the center line of North Ninth street, thence southerly along the center line of North Ninth street to the center line of E street; thence westerly along the center line of E street to the center line of North Tenth street; thence southerly along the center line of North Tenth street to the center line of D street; thence westerly along the center line of D street to the center line of North Eleventh street; thence southerly along the center line of North Eleventh to the center line of C street; thence westerly along the center line of C street to the center line of North Twelfth street; thence southerly along the center line of North Twelfth street one hundred and thirty feet; thence westerly along a line parallel with and one hundred feet northerly from the north side line of B street to a point one hundred feet easterly from the east side line of North Twentieth street; thence northerly along a line one hundred feet easterly from and parallel with the easterly side line of North Twentieth street to a point one hundred (100) feet south of S street; thence easterly along a line parallel with and one hundred feet southerly from the south line of S street to the northeasterly side line of North Front street; thence northeasterly at right angles to North Front street to the low-water line in the Willamette river; and thence southeasterly, following such low-water line to the place of beginning. And as the lots and blocks, and parts of lots and blocks, included within said district as above defined will be drained and sewered both by surface drainage and underground sewerage, by and through the sewer in this ordinance ordered to be located, constructed and put down, the said lots and blocks, and parts of lots and blocks aforesaid, are hereby declared to be directly benefited by such sewer and subject to assessment therefor, in proportion to the benefits received thereby, as provided in section 121 of the city charter of the said city.

SEC. 6. All material used in the construction of said sewer, including the man-holes, catch-basins, lamp-holes and branches, shall be of the best quality and free from defects of any kind; and all work and labor done in the construction of the same shall be done in a good and workmanlike manner and to the satisfaction of the common council of said city.

SEC. 7. The contractor shall take entire charge of the work during its progress, and shall be responsible for any loss or accident resulting from carelessness or neglect, and shall hold the city of Portland free and harmless therefrom.

SEC. 8. The said sewer shall be completed to the satisfaction of the superintendent of streets and the common council of the city of Portland.

SEC. 9. The committee on streets and public property are hereby authorized to advertise for and receive proposals for the construction of said sewer in accordance with the provisions of this ordinance and the plans and specifications therefor, report the several bids therefor to the common council, and enter into contract with the persons, firm or corporation to whom the contract is let by the common council for the construction of said sewer, in accordance with the provisions of this ordinance and the plans and specifications therefor. Each bid shall be accompanied by a bond in the sum of $5,000 in favor of the city of Portland, with the bidder as principal and two good and sufficient sureties thereon, which bond shall be conditioned to the effect that the bidder will, in case the contract is awarded to him, within forty-eight hours after notice of such award, enter into contract and give bond in the penal sum of $20,000 for the faithful and complete performance of all the conditions of such contract, and that in case of a failure to do so that they will forfeit and pay to the said city of Portland the sum of $5,000 and each of such sureties shall subscribe an oath to the effect that he is worth over and above all his just debts and liabilities double the amount for which he becomes surety.

SEC. 10. The contract shall contain a provision that for each day required to complete said contract after the expiration of the time fixed for its completion, the contractor or contractors shall forfeit for the use and benefit of the property-owners affected by such delay, the sum of five dollars ($5). The contract shall contain a further provision requiring the contractor or contractors to whom the contract is let, to keep the said sewer and the streets, pavements, sidewalks and crosswalks, disturbed in laying said sewer or repairing the same, in good repair for the period of one year from the date of the final acceptance of the said sewer, and that if they neglect or fail to make such repairs within three days after receiving notice so to do by the superintendent of streets the city may make such repairs at the expense of the contractor or contractors. The contractor or contractors to whom the contract is let, shall enter into bond within forty-eight hours after receiving notice of the award, with at least two good and sufficient sureties in the penal sum of $20,000 for the true and faithful performance of all the terms and conditions of said contract, which said bond shall also contain a provision that such contractor or contractors shall and will hold the the city of Portland and the officers thereof free and harmless from any and all liability or responsibility from any loss or accident resulting from carelessness or neglect during or resulting from such work and the said bond shall be approved by the mayor of said city, each surety therein shall take and subscribe an oath that he is worth over and above all debts and liabilities, double the sum for which he becomes liable.

SEC. 11. The contract shall also contain a stipulation to the effect that the person, firm or corporation to whom the contract is let shall look for payment only to the fund to be assessed upon the property liable to pay for such sewer, and collected and paid into the city treasury for that purpose, and that they will not require the city of Portland by any legal process or otherwise, to pay the same out of any other fund.

SEC. 12. That R. L. Durham, Charles G. Schramm and H. W. Monastes, disinterested persons, be and they are hereby appointed viewers to estimate the proportionate share of the cost of said sewer to be assessed to the several owners of property benefited thereby in accordance with the provisions of section 121 of the charter of said city and report the same to the common council within sixty (60) days from the date of the approval of this ordinance by the mayor. Said viewers shall hold stated meetings in the office of the auditor and clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimate.

SEC. 13. That the superintendent of streets and city attorney be and they are hereby authorized, required and directed to secure from the owner of the lands along the course of said sewers as defined in this ordinance, proper deeds conveying to the city of Portland the right of way in, through, over and upon the said lands and the right to enter into and upon the said lands and lay down, construct and perpetually maintain in, through, over and upon the said lands the sewer provided for in this ordinance, and the right perpetually to divert the waters of said Tanner creek into, through and along the said sewer.

SEC. 14. That ordinance No. 5037 entitled "An ordinance providing for the time and manner of constructing a sewer, together with the necessary catch-basins, man-holes, lamp-holes and branches along Tanner creek from North Fourteenth and B streets to North Eighth and I streets, and thence along North Eighth street to North Front street, and thence northeasterly to low water in the Willamette river and describing the district to be drained by said sewer, which said sewer shall be paid for by the property benefited by the construction thereof, as provided by section 121 of the city charter.

Approved March 5th, 1887, and all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed.

Passed the common council May 4, 1887.

W. H. WOOD,
*Auditor and Clerk.*

Approved May 7, 1887.

JOHN GATES, *Mayor.*

Portland, Or., May 9, 1887.

41 POULSEN *et als.*
*v.*
THE CITY.

*Ordinance No.* 5162.

APPENDIX B.

42 *Ordinance No.* 5162.

An ordinance adopting the report of the assessor- appointed to assess the cost of constructing a sewer, together with the necessary catch-basins, man-holes, lamp-holes, and branches along Tanner creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, thence along North Eighth street to North Front street, and thence northeasterly to low water in the Willamette river, as provided by ordinance No. 5068, assessing the same and directing an entry of such assessment in the docket of city liens.

The city of Portland does ordain as follows:

SECTION 1. The common council of the city of Portland having by ordinance No. 5068 provided for the construction of a sewer, together with the necessary catch-basins, man-holes, lamp-holes and branches along Tanner creek from North Fourteenth and B streets to North Tenth and H street-, thence along North Tenth street to I street, thence along I street to North Eighth street, and thence along North Eighth street to North Front street, and thence northeasterly to low water in the Willamette river.

And having therein and thereby appointed three disinterested freeholders, viz., R. L. Durham, H. W. Monastes, and Charles G. Schramm to estimate the proportionate share of the cost of such sewer, to be assessed to the several owners of the property benefited thereby, and said assessor- having made their report to the common council, which report being satisfactory is hereby adopted, said report being in words and figures as follows, to-wit:

43 To the hon. the common council of the city of Portland.

GENTLEMEN: The undersigned appointed by your honorable body to assess the cost of constructing a brick sewer along Tanner creek from North 14th and B. streets to North 10th and H. streets, thence along North 10th street to "I" street, thence along "I" street to North Eighth street, thence along North Eighth street to North Front street, thence northeasterly to low water in the Willamette river as provided by ordinance No. 5068, would respectfully beg leave to submit this our report.

We met at the office of the auditor and clerk and were furnished with the plans, specifications, and contract, from which we have ascertained the probable costs to be $35,652.20, thirty-five thousand six hundred and fifty-two & $\frac{20}{100}$ dollars.

In accordance with the requirements of said ordinance No. 5068 we gave notice of our first stated meeting June 25th, 1887, at 6.30 o'clock p. m. (by publication of such notice in the Daily News, the official paper of the city), at which time we met and proceeded with our work, adjourning from day to day until the final completion of our labors. We have assessed the cost of constructing said sewer to the several lots, parts of lots, and tracts of land included within the boundaries defined by you in your ordinance No. 5068 in the several amounts as shown by the following tabulated statement:

Omitted, per stipulation.

44 SECTION 2. The auditor and clerk is hereby directed to enter a statement of the assessment hereby made in the docket of city liens and cause notice thereof to be published in the manner provided by the city charter.

Passed the common council August 17th, 1887.

W. H. WOOD,
*Auditor & Clerk.*

Approved August 19th, 1887.

JOHN GATES, *Mayor.*

45 *Auditor's Certificate.*

STATE OF OREGON,
*County of Multnomah, City of Portland,* } *ss:*

I, W. H. Wood, auditor and clerk of the city of Portland, do hereby certify that I have compared the foregoing copy of ordinance No. 5162, entitled "An ordinance adopting the report of the assessors appointed to assess the cost of constructing a sewer, together with the necessary catch-basins, man-holes, lamp-holes, and branches, along Tanner creek from North Fourteenth and " B " streets to North Tenth and " H " streets, thence along North Tenth street to " I " street, thence along " I " street to North Eighth street, thence along North Eighth to North Front street, and thence northeasterly to low water in the Willamette river, as provided by ordinance No. 5068, assessing the same and directing an entry of such assessment in the docket of city liens," with the original thereof, excepting and omitting from section 1 of said copy of said ordinance the tabulated statement which appears in said original ordinance No. 5162, and that, except as to said omission of said tabulated statement, the same is a full, true, and correct transcript of such original ordinance as the same appears on file and of record in my office and in my care and custody.

In witness whereof I have hereunto set my hand and the seal of the city of Portland, affixed this 2d day of December, 1887.

[SEAL.]

W. H. WOOD,
*Auditor & Clerk.*

46 APPENDIX C.

*Ordinance No.* 5164.

An ordinance making an appropriation out of the fund for the construction of a sewer along Tanner creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, thence along North Eighth street to North Front street, thence northeasterly to low water in the Willamette river.

The city of Portland does ordain as follows:

SECTION 1. That the sum of thirty-five thousand six hundred and fifty-two and twenty-hundredths dollars $35,652.20 be and the same is hereby appropriated out of the fund for the construction of a sewer along Tanner creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, thence along North Eighth street to North Front street and thence northeasterly to low water in the Willamette river, said fund being known as the Tanner Creek sewer fund, to provide for the expenses of constructing said sewer.

Passed the common council August 17, 1887.

W. H. WOOD,
*Auditor & Clerk.*

Approved August 19, 1887.

JOHN GATES, *Mayor.*

47 The regular meeting of the common council of the city of Portland was held this, Wednesday, evening, November 2d, 1887, at 7.30 o'clock.

Present: Hon. John Gates, mayor, presiding.

Officers in attendance: J. F. Farrell, captain of police, and W. H. Wood, auditor & clerk.

The roll being called, the following were noted as present: Councilmen Castendieck, Farrell, Fliedner. Forbes, Gallagher, Gerdes, Hacheney, Schwab, and Woodward—9.

The following resolution from the committee on streets and public property was read:

"Resolved, That the auditor and clerk be, and he is hereby, directed to issue warrants to the chief of police for the collection of delinquent assessments for the construction of the sewer from 14th & "B" streets to the Willamette river, known as Tanner Creek sewer."

On motion of Councilman Fliedner, the resolution was adopted.

W. H. WOOD,
*Auditor & Clerk.*

48 *Auditor's Certificate.*

STATE OF OREGON,
*County of Multnomah, City of Portland,* } *ss:*

I, W. H. Wood, auditor and clerk of the city of Portland, do hereby certify that I have compared the foregoing copy of the record of the proceedings of the common council of the city of Portland, Oregon, for the regular meeting of Nov. 2, 1887, so far as the same relates to the issuing of warrants to the chief of police for the collection of delinquent assessments for the construction of the Tanner Creek sewer, with the original thereof, and that the same is a full, true, and correct transcript of such original record as the same appears on file and of record in my office and in my care and custody.

In witness whereof I have hereunto set my hand and the seal of the city of Portland, affixed this 2d day of December, 1887.

[SEAL.] W. H. WOOD,
*Auditor & Clerk of the City of Portland,*
By —— ——, *Deputy.*

49 Due service of the within amended complaint by certified copy as prescribed by law is hereby admitted, at Portland, Or., February 4th, 1888.

W. H. ADAMS,
*Attorneys for Defendants.*

50 [Endorsed :] No. 7954. In the circuit court of the State of Oregon for the county of Multnomah, department No. 2. Johan Poulsen *et als.*, plaintiffs, *vs.* The City of Portland *et al.*, defendants. Amended complaint. Filed Feb. 4th, 1888. Wm. Church, Jr., clerk, by C. J. Christie, deputy. Williams & Wood, S. B. Linthicum, attorneys for pl'ff's.

51 *Summons.*

In the Circuit Court of the State of Oregon for the County of Multnomah.

JOHAN POULSEN *et al.*, Plaintiffs,
*vs.*
THE CITY OF PORTLAND *et al.*, Defendants. } In Equity.

To The City of Portland, John Gates, mayor of said city; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hackeney, William Fliedner, composing the common council of said city, and Samuel B. Parrish, chief of police of said city, defendant-:

In the name of the State of Oregon:

You are hereby required to appear and answer the complaint filed against you in the above-entitled action within ten days from the date of the service of this summons upon you, if served within this county, or if served within any other county of this State, then within twenty days from the date of the service of this summons upon you; and, if you fail to answer, for want thereof the plaintiff- — apply to the court for the relief prayed for in the complaint.

WILLIAMS, ACH & WOOD AND
S. B. LINTHICUM,
*Attorneys for Plaintiff-.*

52 STATE OF OREGON,
*County of Multnomah,* } *ss:*

I hereby certify that I served the within summons within said State and county on the 3d day of December, 1887, on the within-named The City of Portland, John Gates, J. J. Gallagher, R. Gerdes, G. Castendieck, S. Farrell, R. H. Schwab, C. M. Forbes, Tyler Woodward, F. Hackeney, Wm. Fliedner, and W. H. Wood, auditor and clerk of the city of Portland, by delivering a copy thereof, prepared and certified to by me as sheriff, to each in person, together with a copy of the complaint, prepared and certified by C. E. S. Wood, one of the plaintiffs' attorneys, to Samuel B. Parrish, chief of police of the said city of Portland, by direction of plaintiffs' attorney, said direction being endorsed thereon to Samuel B. Parrish, in person.

(Signed) THOS. A. JORDAN,
*Sheriff of Multnomah County, Oregon,*
By —— ——, *Deputy.*

53 To the sheriff of Multnomah county:

You are hereby authorized and directed to serve the copy of complaint upon S. B. Parrish, one of the above-named defendants.

WILLIAMS, ACH & WOOD,
S. B. LINTHICUM,
*Att'ys for Pl'ffs.*

Received December 3d, 1887.

THOS. A. JORDAN, *Sheriff.*

54 [Endorsed:] No. 7954. Summons. In the circuit court of the State of Oregon, county of Multnomah. Johan Poulsen *et al.*, plaintiffs, *vs.* The City of Portland *et al.*, defendants. In equity. Filed Dec. 9, 1887. Wm. Church, Jr., clerk. Williams, Ach & Wood and S. B. Linthicum, att'ys for plaintiffs.

55 *Demurrer.*

In the Circuit Court of the State of Oregon, Multnomah County.

JOHAN POULSEN *et al.*, Plaintiffs,
*vs.*
THE CITY OF PORTLAND, JOHN GATES, Mayor of said City; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hacheney, William Fliedner, and John Gates, Composing the Common Council of said City of Portland, and Samuel B. Parrish, Chief of Police of said City, Defendants.

Now comes the above-named defendants and demur to the amended complaint herein filed upon the following grounds and for the following reasons, to wit:

1. That there is a misjoinder of parties plaintiff in said amended complaint, in this, that there are numerous persons owning separate and distinct parcels of land not similarly situated nor similarly affected by the matters alleged in said amended complaint and, not having any unity of interest in the subject of the suit or the relief demanded, are improperly joined as plaintiffs therein.

2. That there is a defect of parties in said amended complaint, in this, that there is no such unity of interest among the said plaintiffs in the subject of said suit or the relief demanded therein as to entitle them to be joined as parties plaintiff therein.

3. That said amended complaint does not state facts sufficient to constitute a cause of suit.

W. H. ADAMS, MITCHELL, McDOUGALL,
TANNER & BOWER,
*Attorneys for Defendants.*

56 STATE OF OREGON,
*County of Multnomah,* } *ss:*

Due service of the within demurrer is hereby accepted in Multnomah county, Oregon, this 7th day of February, 1888, by receiving a copy thereof, duly certified to as such by C. J. McDougall, of attorneys for defendants.

S. B. LINTHICUM,
*Of Attorneys for Plaintiffs.*

57 [Endorsed:] No. 7954. In the circuit court of the State of Oregon for the county of Multnomah, department No. 2. Johan Poulsen *et al.*, plaintiffs, *vs.* The City of Portland *et al.*, defendants. Demurrer to amended complaint. Filed Feb'y 7th, 1888. Wm. Church, Jr., clerk, by —— ——, deputy. W. H. Adams and Mitchell, McDougall, Tanner & Bower, attorneys for def'ts.

58 Be it remembered that at a regular term of the circuit court of the State of Oregon for the county of Multnomah, begun and held at the county court-house, in the city of Portland,

in said county and State, on Monday, the 16th day of January, A. D. 1888, the same being the 3d Monday in said month and the time fixed by law for holding a regular term of said court, Hon. Loyal B. Stearns, judge, presiding in department No. 2.

Whereupon, on this Monday, the 20th day of February, A. D. 1888, the same being the 30th judicial day of said term of said court holden, among other proceedings the following was had, to wit:

### *Decree.*

JOHN PAULSEN *et al.*, Pl'ffs,
*vs.*
THE CITY OF PORTLAND *et al.*, Def'ts.

This cause heretofore came on duly to be heard upon the demurrer of defendants to plaintiffs' amended complaint herein, and after hearing the argument of counsel the court, not being fully advised in the premises, took the same under consideration until this time, and now, at this time, the court, having considered the same and being now fully advised in the premises, finds that said demurrer is not well taken and should be overruled, and it is therefore ordered that the said demurrer of defendants to the amended complaint herein be, and the same is hereby, overruled.

59 And the said defendants appearing at this time by W. H. Adams, city attorney, and Mr. A. H. Tanner, of their attorneys, and in open court expressly refus*ed* to further plead or answer herein, but electing to stand by their said demurrer, upon notice of attorneys for plaintiffs it is further ordered, adjudged, and decreed that the temporary restraining order heretofore issued herein be, and the same is hereby, made perpetual, and that the City of Portland, John Gates, mayor of said city; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrel, C. H. Forbes, Tyler Woodward, F. Hacheney, William Fliedner, and John Gates, composing the common council of said city, and Samuel B. Parrish, chief of police of said city, the defendants herein, be, and they are, and each of them, and especially the said defendant, Samuel B. Parrish, chief of police of said city of Portland, is hereby, permanently and perpetually enjoined and restrained from proceeding further herein, and especially from collecting or attempting to collect any of the taxes or assessments levied or made against the property of the plaintiffs herein, to wit, A. Alfreds, J. J. Allard, Alfred Anderson, F. A. Anderson, John Anderson (No. 1), John Anderson (No. 2), O. H. Anderson, C. R. Andrichke, F. Backmann, C. P. Bacon, George Bants, John Barrett, G. W. Bates, Sam. L. Beary, John Berg, Mary E. Biles, Mrs. A. E. Biles, Mrs. A. M. Biles, F. Blied, L. Bovie, E. Bollam, Ellenn Barbare, A. E. Borthwick, Otto Bourne, Mrs. S. E. Bradley, Thomas Brazee, P. E. Brigham, Mrs. Joseph Brinkerhoff, Felicia Brown, H. Brown, J. Burnham, W. J. Burns, Thomas W. Burton, T. Callahan, D. F. Campbell, M. Campbell, Edward Campion, S. Carney, H. P. Christiansen, J. Clossett, D. Coman, M. Connerton, M. Connerton, H. W. Corbett, Mary H. Couch,

George W. Cummings, William Dineen, T. Dineen, Charles
H. Dodd, John Dougherty, Anna E. Dowell, Fannie Dowell, A.
Drange, Jerry Driscoll, A. Driver, Anna Mary Erkkola,
60 Joseph Ewen, P. J. Fay, A. Ferrera, L. Flieshner, John R.
Foster, William Frazier, William Frazier and L. P. W.
Quimby, tenants in common, assessed for the purpose of taxation
on the books of the defendant The City of Portland as Frazier &
Quimby; R. D. Freeborn, M. Fried, Ellen Gaffney, James Carson,
J. K. Gill, L. W. Gilliland, D. Gerard, J. W. Going, Elizabeth Good,
George Good, John Gorman, William H. Gross, John Gustafson, N.
J. Hammel, A. J. Hanlan, Simon Harris, L. Hexter, L. H. Hilliland,
Sol. Hirsch, L. Hoffman, Marie Hornung, George W. Hoyt, R.
Irving, Mrs. S. Irving, Lena W. Jacobson, William Jacobson, Lily A.
James, Lily A. James, guardian of George V. James, an insane person;
Joseph Jaskolla, Mary Jenkins, T. Johnston, John Kiernan, R. B.
Knapp, R. Knoll, Philip Kohl, M. Koshland, J. Krumbein, Louis Larsen,
Felix Laurent and Eugene Pierard, tenents in common, assessed
for the purpose of taxation on the books of the defendant The City
of Portland as Lorens & Pierard; George Lawrence, D. Lefever, C.
Leonard, C. H. Lewis, L. H. Lewis, Theo. H. Liebe, engaged in
business under the firm name of Theo. H. Liebe & Co.; W. L.
Lightner, Charles Logus, James Lotan, Mary Lowe, P. Lowengart,
C. Madigah, Ann Manning, T. R. Manning, C. O. Maren, Sarah E.
Marshall, Paul Merrick, George Moore, John B. Morgan, Mary Mulvany,
Honora L. Murphy, John Murta, D. Macay, P. McFeeley, Mary
McGowan, Catherine McGrath, Matilda C. McIntosch, Kenneth
A. J. McKenzie, Ryan S. McLearan and Frank W. McLearan,
partners in business as McLearan Brothers; Abbie McNeil, Marie
Naucke, O. W. Nelson, Maria Newstead, August Noffke, W.
Noon, Emil Nordstrom, The Norwegian-Danish Church, a corporation
organized and existing under the laws of the State of
Oregon and assessed for the purpose of taxation in the
books of the defendant The City of Portland as the Scandinavian
Church; D. O'Brian, Mrs. Mary T. O'Brien,
61 T. J. O'Brien, Johanna O'Connor, Thomas O'Connor, the
owner of certain property in the district mentioned in the
complaint, assessed for the purpose of taxation on the books of
the defendant The City of Portland as the property of P. C. Smith;
H. G. O'Neil, J. J. O'Neil; John F. O'Shea and James B. O'Shea,
partners in business under the firm name of O'Shea Brothers; The
Oregon Transfer Company, a corporation organized and existing
under the laws of the State of Oregon; Alex. E. Osmand, Catherine
Osmond, Christiana Osmond, A. J. Owen, P. L. Owen, Mary Perault,
Johan Poulsen, Pat. Powers, A. Prager, J. Prideaux, L. P. W. Quimby,
Albert Rahles, J. P. Rasmussen, Agnes Ried, E. J. Richards, Frank
Richet, Thomas Richet, and Thomas Richet, Jr., partners in business
under the firm name of Richet Brothers & Company; Mrs.
Sarah Rosenfeld, Anna S. Ryan, Louis Setchstein, Louis Sechstein,
M. Seller, J. F. O'Shea, C. S. Sherar, P. H. Schulderman, J. Slaughterback,
George R. Smith, Mary A. Smith, Max Smith, Mary E.
Spaulding, W. W. Spaulding, M. M. Spaulding, and Thomas Pap-

worth, partners in business under the firm name of Spaulding & Papworth; Joseph Spencer, James Steel, B. L. Stone, John Storah, L. Terry, J. S. Thomas, Mrs. M. S. Thornton, C. Touchle, H. Trenkmann, Mary B. Trevit, D. S. Tuthill, Thomas Varwig, Fanny Wallace, H. W. Wallace, Carrie W. Wallace, W. R. Wallace, John E. Walsh, P. Wassinger, A. Waterford, William Waterford, Geo. M. Weidler, H. Weinard, Thomas Whalen, John Wilhelm; The Willamette Steam Mill, Lumbering and Manufacturing Company, a corporation organized and existing under the laws of the State of Oregon; Anna M. Williams, Kate Williams, Mrs. C. E. Wilson, H. C. Wilson, J. K. Wilson, and Theodore Wygant, or any of them, to aid towards the payment for the construction of said Tanner Creek sewer or any part thereof, or to in any manner interfere with the property of said plaintiffs or any of them or their use or enjoyment thereof, or of any part of the same.

62 And it is further ordered, adjudged, and decreed that the entries of all charges against any of the property of said plaintiff- herein or any of them on account of any assessment or assessments for the payment for the construction of the said Tanner Creek sewer or any part thereof, made in the docket of city liens of said city of Portland, be and the same are, & each of them is hereby, cancelled and annulled, and the city auditor and clerk is hereby authorized, ordered, and directed to cancel the same and each of them of record, and that plaintiffs have and recover from defendants their costs and disbursements herein taxed at $——, and that execution issue therefor.

(Signed) LOYAL B. STERNS, *Judge.*

63 [Endorsed:] No. —. In the circuit court, Multnomah county, State of Oregon, January term, 1888. Judgment. Rendered Feb'y 20th, 1888. Docketed Feb'y 20th, 1888. Johan Poulsen *et al. vs.* City of Portland. Judgment. Decree on demurrer. Filed Feb'y 21st, 1888. Wm. Church, Jr., clerk, by C. J. Christie, deputy.

64 In the Circuit Court of the State of Oregon for Multnomah County.

JOHAN POULSEN, A. ALFREDS, J. J. ALLARD, ALFRED ANDERSON, F. A. Anderson, John Anderson (No. 1), John Anderson (No. 2), O. H. Anderson, C. R. Andrichke, F. Backmann, C. P. Bacon, George Bants, John Barrett, G. W. Bates, Sam. L. Beary, John Berg, Mary E. Biles, Mrs. A. E. Bills, Mrs. A. M. Bills, F. Blied, L. Borie, E. Bollam, Ellen Barbare, A. E. Borthwick, Otto Bourne, Mrs. S. E. Bradley, Thomas Brazel, P. E. Brigham, Mrs. Joseph Brickerhoff, Felecia Brown, H. Brown, J. Burnham, W. J. Burns, Thomas W. Burton, T. Callahan, D. F. Campbell, M. Campbell, Edward Campion, S. Carney, H. P. Christianson, J. Closset, —— Conan, M. Connerton, M. Connerton, H. W. Corbett, Mary H. Couch, George W. Cummings, William Dineen, T. Dineen, Charles E. Dodd, John Daugherty, Anne E. Dowell, Fannie Dowell, A. Drange,

Jerry Driscoll, A. Droix, Anna Mary Eskkola, Joseph Ewen, P. J. Fay, A. Ferrera, L. Fleishner, John R. Foster, William Frazier, William Frazier and L. P. W. Quimby, Tenants in Common, Assessed for the Purpose of Taxation on the Books of the Defendant The City of Portland as Frazier & Quimby; R. D. Freeborn, M. Fried, Ellen Gaffney, James Garson, J. K. Gill, L. W. Gilliland, D. Gerard, J. W. Going, Elizabeth Good, George Good, John Gorman, William H. Gross, John Gustafson, N. J. Hammel, A. J. Hanlan, Simon Harris, L. Hexter, L. N. Hilliland, Sol. Hirsh, L. Hoffman, Maria Hornung, George W. Hoyt, R. Irving, Mrs. S. Irving, Lena W. Jacobson, William Jacobson, Lily A. James, Lily A. James, Guardian of George V. James, an Insane Person; Joseph Jaskalla, Mary Jenkins, T. Johnston, John Kiernan, R. B. Knapp, R. Knoll, Philip Kohl, M. Koshland, J. Krumbien, Louis Larsen, Felix Laurent and Eugene Pierard, Tenants in Common, Assessed for the Purpose of Taxation on the Books of the Defendant The City of Portland as Lorens & Pierard;
65 George Lawrence, D. Lefever, C. Leonard, C. H. Lewis, L. H. Lewis, Theo. H. Leibe, Engaged in Business under the Firm Name of Theo. H. Liebe & Co.; W. L. Lightner, Charles Logus, James Lotan, Mary Lowe, P. Lowengart, C. Madigan, Ann Manning, T. R. Manning, C. O. Maren, Sarah E. Marshall, Paul Merrick, George Moore, John B. Morgan, Mary Mulvany, Honora L. Murphy, John Murta, D. Mackay, P. McFeeley, Mary McGowan, Catherine McGrath, Matilda C. McIntosh, Kenneth A. J. McKenzie, Ryan S. McLearen and Frank W. McLearen, Partners in Business as McLearen Brothers; Abbie McNeil, Marie Naucke, C. W. Nelson, Maria Newstead, A-gust Noffke, W. Noon, Emil Norstrom, The Norwegian-Danish Church, a Corporation Organized and Existing under the Laws of the State of Oregon and Assessed for the Purpose of Taxation in the Books of the Defendant, The City of Portland as the Scandinavian Church; D. O'Brien, Mrs. Mary T. O'Brien, T. J. O'Brien, Thomas O'Connor, Johanna O'Connor, the Owner of Certain Property in the District Mentioned in the Complaint Assessed for the Purpose of Taxation in the Books of the Defendant The City of Portland as the Property of P. C. Smith; H. G. O'Neil, J. J. O'Neil, John F. O'Shea, and James B. O'Shea, Partners in Business under the Firm Name of O'Shea Brothers; The Oregon Transfer Company, a Corporation Organized and Existing under the Laws of the State of Oregon; Alex. E. Osmond, Catherine Osmond, Christiana Osmond, A. J. Owen, P. L. Owen, Mary Perault, Johan Poulsen, Pat. Powers, A. Prager, J. Prideaux, L. P. W. Quimby, Albert Rahles, J. P. Rasmussen, Agnes Reid, E. J. Richards, Frank Richet, Thomas Richet, and Thomas Richet, Jr., Partners in Business under the Firm Name of Richet Brothers & Company; Mrs. Sarah Rosenfeld, Anne S. Ryan, Louis Sechstem, M. Sellers, J. F. Shea, C. S. Sherer, P. H. Schulderman, S. Slaughterback, George R. Smith, Mary A. Smith, Max Smith, Mary E. Spaulding, W. W. Spaulding, M. M. Spaulding, and Thomas Papworth, Partners in Business under the Firm Name of Spaulding & Papworth; Joseph

Spencer, James Steel, B. L. Stone, John Storan, L. Terry, J. S. Thomas, Mrs. M. S. Thornton, C. Tockle, H. Trenkmann,
66 Mary B. Trevitt, D. S. Tutthill, Thomas Varwig, Fannie Wallace, H. W. Wallace, Carrie W. Wallace, W. R. Wallace, John E. Walsh, P. Wassinger, A. Waterford, William Waterford, Geo. W. Weidler, H. Weinhard, Thomas Whalen, John Wilhelm, The Willamette Steam Mills, Lumbering and Manufacturing Company, a Corporation Organized and Existing under the Laws of the State of Oregon; Anna M. Williams, Kate Williams, Mrs. C. E. Wilson, H. C. Wilson, J. K. Wilson, and Theodore Wygant, Plaintiffs,

*vs.*

THE CITY OF PORTLAND, JOHN GATES, Mayor of said City; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hacheney, William Fliedner, and John Gates, Composing the Common Council of said City, and Samuel B. Parrish, Chief of Police of said City, Defendants.

To the above-named plaintiffs and to Messrs. Williams, Woods & Linthicum, their attorneys:

You and each of you will please take notice that the above-named defendants hereby appeal from the decree made and entered in the above-entitled cause and court on the twentieth day of February, 1888, against the defendants in favor of plaintiffs above named, adjudging and decreeing as follows, to wit:

That the temporary restraining order heretofore issued herein be, and the same is hereby, made perpetual, and that the City of Portland, John Gates, mayor of said city; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, William Fliedner, and John Gates, composing the common council of said city, and Samuel B. Parrish, chief of police of said city, be, and they are and each of them, and especially the said defendant, Samuel B. Parrish, chief of police of said city of Portland, is hereby permanently and perpetually enjoined and restrained from proceeding further herein, and especially from collecting or attempting to collect any of the taxes or assessments
67 levied or made against the property of the plaintiffs herein or any of them to and towards the payment of the construction of said Tanner Creek sewer or any part thereof or to in any manner interfere with the property of said plaintiffs or any of them or their use or enjoyment thereof or of any part of the same, and it is further ordered and adjudged and decreed that the entries of all charges against any of the property of said plaintiffs herein or any of them on account of any assessment or assessments for the payment for the construction of the said Tanner Creek sewer or any part thereof made in the docket of city liens of said city of Portland be, and the same are and each of them is hereby, cancelled and annulled, and that the city auditor & clerk is hereby authorized, ordered, and directed to cancel the same and each of them of record, and that plaintiffs have and recover of and from defendants their costs and disbursements herein taxed at $—, and that execution

issue therefor, and from the whole and every part of said decree to the supreme court of the State of Oregon.

W. H. ADAMS AND MITCHELL,
McDOUGALL, TANNER & BOWER,
*Attorneys for Defendants.*

68 STATE OF OREGON,
*County of Multnomah,* } *ss :*

Due services of the within notice of appeal is hereby accepted in Multnomah county, Oregon, this 23d day of February, 1888, by receiving a copy thereof duly certified to as such by A. H. Tanner, of attorneys for defendants.

WILLIAMS & WOOD,
*Of Attorneys for Plaintiffs.*

69 [Endorsed:] No. —. In the circuit court of the State of Oregon for the county of Multnomah, department No. 2. Johan Poulsen *et al.*, plaintiffs, *vs.* The City of Portland *et al.*, defendants. Notice of appeal. Filed Feb'y 23d, 1888. Wm. Church, Jr., clerk, by —— ——, deputy. —— ——, attorneys for —.

70 *Stipulation.*

In the Circuit Court of the State of Oregon for Multnomah County, Dept. No. 2.

JOHAN POULSEN *et als.*, Plaintiffs,
*vs.*
CITY OF PORTLAND *et als.*, Defendants.

It is hereby stipulated between the parties hereto that the original map of the district of property assessed for construction of said Tanner Creek sewer and all other exhibits may be used as a part of the transcript of the pleadings in this cause on the appeal and the said original map may be used on the hearing in the supreme court, and, when said cause is therein determined on said appeal, that said map and exhibits shall be returned to the clerk of the said circuit court, and that neither party shall object to the transcript on appeal on account of the use of said original map instead of a certified copy thereof, and that the restraining order made upon the original complaint may be transmitted with the amended complaint as part of the record subsequent to said amended complaint.

(Signed) WILLIAMS & WOOD, *Att'ys for Pl'ffs.*
W. H. ADAMS AND
MITCHELL, McDOUGALL, TANNER,
& BOWER, *Att'ys for Def'ts.*

71 [Endorsed:] Johan Poulsen *vs.* City of Portland. Stipulation.

Original endorsed: Filed Feb'y 28, 1888. Wm. Church, Jr., clerk, by C. J. Christie, deputy.

72 *Restraining Order.*

In the Circuit Court of the State of Oregon for the County of Multnomah, Department No. 2.

Johan Poulsen *et als.*, Plaintiffs,
*vs.*
The City of Portland *et al.*, Defendants.
} In Equity.

Upon reading the petition herein filed on behalf of F. A. Anderson, John Anderson, W. J. Burns, Thomas W. Burton, Ellen Barbare, Anna E. Dowell, Fannie Dowell, A. Drange, William Frazier and L. P. A. Quimby (assessed as Frazier & Quimby), John R. Foster, Ellen Gaffney, Elizabeth Good, L. W. Gilliland, Maria Hornung, T. Johnson, Lena W. Jackson, Felix Laurant and Eugene Pierard (assessed as Lorens & Pierard), James Lotan, Sarah E. Marshall, C. Madigan, John Murta, Ann Manning, Mary Mulvany, Mary McGowan, Catherine McGrath, Matilda C. McIntosh, Abbie McNeil, P. McFeeley, Maria Naucke, Maria Newstead, H. G. O'Neil, Catherine Osmond, Christina Osmond, The Oregon Transfer Company, Mary Perault, J. Prideaux, Anna S. Ryan, J. F. Shea, Mary A. Smith, C. S. Sherer, Mary B. Trevitt, D. S. Tutthill, Carrie W. Wallace, Anna M. Williams, John E. Walsh, and on hearing Mr. C. E. S. Wood, of counsel for plaintiffs and for these petitioners, who as said attorney has consented and agreed that the undertaking already filed shall apply in full force and effect to these petitioners—

It is hereby ordered that the defendants, and especially the defendant Samuel B. Parrish, chief of police of the city of Portland, and their agents and servants be, and they are hereby, severally restrained until the further order of this court from doing any of the acts complained of in the complaint already filed, from collecting
73 or attempting to collect any of the taxes or assessments levied or made against any of the property of these petitioners or either of them to aid in the payment for construction of the Tanner Creek sewer.

It is also ordered that the petitioners named in line- 30 & 31 and —, p. 1, and lines 1 to 14, p. 2, of said petition be admitted as plaintiffs in this suit, and that the suit be dismissed as to Mrs. B. F. Dowell, H. Fitzpatrick, A. Gaffney, Robert McIntosh, F. Naucke, Thomas Patterson, Charles Perault, J. E. Smith, T. B. Trevitt, and L. W. Wallace.

In open court.

LOYAL B. STEARNS, *Judge.*

January 3d, 1888.

74 State of Oregon,
*County of Multnomah,* } *ss:*

I hereby certify that I served the within restraining order within said State and county on the 3d day of January, 183–, on the within-named The City of Portland by delivering a copy thereof, prepared and certified to by me as sheriff, to Samuel B. Parrish, chief of police of the said city of Portland, to the said Samuel B. Parrish in person.

THOS. A. JORDAN,
*Sheriff of Multnomah County, Oregon.*

75 [Endorsed :] In the circuit court of the State of Oregon for Multnomah county. Johan Poulsen *et als. vs.* The City of Portland *et al.* Copy of restraining order.

Original endorsed : Filed January 18, 1888. Wm. Church, Jr., clerk.

76 In the Circuit Court of the State of Oregon for Multnomah County.

JOHAN POULSEN *et al.*, Plaintiffs and Resp's,
*vs.*
THE CITY OF PORTLAND, Defendants and App's.

STATE OF OREGON,
*County of Multnomah,* } *ss :*

I, Wm. Church, Jr., county clerk and clerk of the circuit court of the State of Oregon for Multnomah county, do hereby certify that on the 25th day of Feb'y, 1888, The City of Portland *et al.*, the def'ts and app'lts in the above-entitled cause, filed their undertaking on appeal in the sum of — dollars, with F. D. Mathews as surety therein, conditioned that said appellants will pay all damages, costs, and disbursements which may be awarded against them on the appeal or for any judgment which may be awarded against them on said appeal ; and I further certify that said undertaking is given for an appeal and a stay of proceedings also.

[SEAL.] In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 3d day of March, A. D. 1888.

WM. CHURCH, JR., *Clerk.*

77 *Clerk's Certificate.*

STATE OF OREGON,
*County of Multnomah.* }

I, Wm. Church, Jr., county clerk and clerk of the circuit court of the State of Oregon for the county of Multnomah, do hereby certify that the foregoing copies of pleadings, papers, orders and journal entries, appendixes, decree and council proceedings, stipulation, and restraining order, constituting the judgment-roll, together with the notice of appeal, in the case of Johan Poulsen *et al.*, plaintiffs and respondents, *vs.* The City of Portland *et al.*, defendants and appellants, have been by me compared with the originals thereof, and that they are true and correct transcripts of such original pleadings, papers, orders, journal entries, appendixes, decree, council proceedings, stipulation, restraining order, and notice of appeal as the same appear of record and on file at my office and in my custody.

[SEAL.] In witness whereof I have hereunto set my hand and affixed the seal of said circuit court this 3d day of March, A. D. 1888.

WM. CHURCH, JR., *Clerk.*

78 [Endorsed:] No. 3034. In the supreme court of the State of Oregon. Appeal from Multnomah county. Johan Poulsen *et al.*, plaintiffs and respondents, *vs.* The City of Portland *et al.*, defendants and appellants. Transcript. Filed March 6th, 1888. W. H. Holmes, clerk.

79 JOHAN POULSEN *et al.*, Respondents,
*vs.*
THE CITY OF PORTLAND *et al.*, Appellants.

*Sewers—Collection of Assessments. Filed July 2d,* 1888.

Where the common council of the city of Portland, by ordinances duly adopted, caused a certain sewer in the north part of the city, known as Tanner Creek sewer, to be constructed at a cost of over thirty-five thousand dollars, which it directed to be assessed on property it declared to be directly benefited thereby under the authority contained in § 121 of the city charter, providing "that the common council of the city shall have power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such sewer or drain, and to estimate the proportionate share of cost thereof, to be assessed to the several owners so benefited"—

Held, in a suit brought by a number of the owners of the property to enjoin the collection of the assessments upon the grounds of the charter not requiring notice of the proposed construction of such works to be given and of the assessment having been arbitrarily levied without regard to the value of the benefits conferred by the improvement, that such owners were properly united as plaintiffs in the suit if such ordinances were void.

That although the interest- of such owners were distinct, that they differed in extent and were not similarly affected, yet, the cause being common to them all and each having the same character of remedy, they had a sufficient community of interest to entitle them to join as such plaintiffs.

80 Held, however, following the decision of this court in Strowbridge *vs.* City of Portland, 8 Or., 67, which the court under the particular circumstances of this case regards itself as bound to do, that the failure of the charter to require such notice to be given does not render § 121 void, nor do the proceedings had under it have the effect to deprive such owners of their property "without due process of law."

Held, that where a question has been decided by this court and parties, relying upon the decision as a settled rule of law, have transacted important affairs which would be seriously affected by a change of the rule, the court will adhere to it in subsequent cases, however it might be inclined to hold if the question were *res integra*.

Held, that the assessment of a proportionate share of the cost of a local improvement by the officers of a municipal corporation upon parties specially benefited thereby cannot be made in excess of the value of the benefit conferred; but where the improvement directly benefits the property of such parties the question of the extent of the value thereof must be determined by the proper officers of the corporation.

The courts will not interfere in such a case unless the property assessed is so situated as to render it physically impossible for the improvement to benefit it or where the mode of levying the assessment excludes the consideration of the question of value of the improvements.

Held, that as said section 121 of the city charter of the city of Portland only empowers the common council of the city to lay down necessary sewers and drains, it is a limitation upon the power of the council to establish the same unless the benefits to the property accommodated thereby will be equal to or in excess of the cost of their construction.

81 Held, that where an assessment is levied upon property for a share of the cost of a local improvement which is so situated that it cannot possibly be benefited thereby, the owner of the property may maintain a suit to prevent the enforcement of the assessment, but that different owners of distinct parcels of property so assessed have no right to join as plaintiffs in such suits.

Appeal from a decree of the circuit court for the county of Multnomah.

Williams & Wood and S. B. Linthicum, for respondents.

W. H. Adams and Mitchell, McDougall, Tanner & Bower, for appellants.

82 Opinion by THAYER, *J.*:

The respondents, consisting of about two hundred persons, brought a suit in said circuit court to enjoin the collection of an assessment for the construction of a sewer in the north part of the city of Portland, known as Tanner Creek sewer.

The common council of said city on the 5th day of March, 1887, passed an ordinance, known as ordinance No. 5068, providing for the construction of the said sewer.

The termini and course the sewer was to be laid were specified in the ordinance, the territorial district to be drained and sewered was defined therein, and the lots and blocks within such district which were declared to be benefited and subject to assessment on account of such sewer were named.

The said ordinance also contained the following provisions:

"That R. L. Durham, Charles G. Schram, and H. W. Monastes, disinterested persons, be, and they are hereby, appointed viewers to estimate the proportionate share of the cost of said sewer to be assessed to the several owners of the property benefited thereby, in accordance with the provisions of section 121 of the charter of said city, and report the same to the common council within sixty days from the date of the approval of this ordinance by the mayor. Said viewers shall hold stated meetings in the office of the auditor and clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimate."

The said viewers, in pursuance of the said provision contained in said ordinance, made and filed their report on the third day of July, 1887, and the said common council thereupon passed an ordinance, known as ordinance No. 5162, approved August 19, 1887, by which they adopted the said report of the viewers and directed the auditor and clerk to enter a statement of said assessment in the docket of city liens, and that on the 22d day of November, 1887, war-
83 rants were issued for the collection thereof, in pursuance of which the chief of police of said city at the time of the commencement of the suit attempting to collect said assessments.

The respondents, who are owners in severalty of certain lots and parcels of land within said district which are respectively charged with a portion of said assessments, seek to have the statement entered in the docket of city liens set aside and canceled and the proceedings to enforce the assessments perpetually enjoined.

The grounds upon which they claim such relief, as shown by their complaint filed in the suit, are that said section 121 of the charter of said city of Portland, under which the said viewers were required to estimate the proportionate shares of the cost of said sewer to be assessed to the several owners of the property benefited thereby, is unconstitutional and void; that said ordinance No. 5068 is unconstitutional and void, and that the property assessed was not directly benefited by said sewer.

Said section 121 of the city charter provides "that the council shall have the power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such sewer or drain; but that the mode of apportioning estimated costs of improvement of streets, prescribed in sections 112 and 113 of the charter, shall not apply to the construction of such sewers and drains; and that when the council shall direct the same to be assessed on the property directly benefited, such expense shall, in every other respect, be assessed in the same manner as is provided in the case of street improvements: Provided, that the council may, at its discretion, appoint three disinterested persons to estimate the proportionate share of the cost of such sewer or drain, to be assessed to the several owners of the property benefited thereby and in the construction of any sewer or drain, the city shall have the right to use and divert from their natural course any and all creeks or streams running through the city into such sewer or drain."

84 Neither said section 121 nor any other section or clause of the city charter requires any notice to be given to the owner of lots and blocks assessed with a share of the cost of such sewer or drain of the proposed construction thereof.

The common council is empowered to lay down such sewers and drains and assess the cost thereof on the property directly benefited thereby upon its own motion.

It is upon this ground that the respondents claim the said ordinances to be unconstitutional, which is the main question in the case.

The appellants interposed a demurrer to the respondents' complaint upon the grounds: 1. That there was a misjoinder of parties plaintiff in that, to wit, there were numerous persons owning separate and distinct parcels of land not similarly situated nor similarly affected by the matters alleged in the complaint and not having any unity of interest in the subject of the suit, or the relief demanded, joined as plaintiffs.

(2.) That there was a defect of parties in that, to wit, there was no such unity of interest among the said plaintiffs in the subject of the suit or the relief demanded therein as entitled them to be so joined.

(3.) That said complaint did not state facts sufficient to constitute a cause of suit.

The circuit court overruled the demurrer and the appellants failing to answer *over* granted a decree for the relief prayed in the complaint.

The demurrer to the complaint for misjoinder of plaintiffs and defects of parties did not specify the proper grounds of objection.

Misjoinder of parties is no ground of objection by demurrer and it did not appear from the face of the complaint that there was a defect of parties.

The objection which the appellants' counsel aimed to raise
was that several causes of suit had been improperly united.
85 But I do not think a demurrer would lie upon that ground
if the ordinance levying the assessment was void.

The plaintiffs' interests were, it is true, distinct and differed in extent, and very likely were not similarly affected, but the cause was common to them all, and their respective remedies for redress or prevention were the same.

The case would be analogous to that of a nuisance affecting several owners of real property, where it is a common injury to them all, and they each have the same character of remedy to abate it.

I think that in all cases where parties are threatened with injury from one wrong they have a sufficient community of interest to entitle them to unite as plaintiffs in a suit to prevent it, although their interests are distinct and affected to a different extent.

Such a rule should be maintained in order to prevent a multiplicity of suits, and is now, as shown by the authorities cited by the respondents' counsel, well established.

The respondents' counsel contend that said ordinances and proceedings had thereon are unconstitutional, for the reason that the plaintiffs in the suit are arbitrarily declared benefited without any notice or opportunity to them to be heard on that point or as to the amount of the assessment, and that the effect thereof is to deprive them of their property without due process of law, which the counsel insists is contrary to the fourteenth amendment of the Constitution of the United States.

Said amendment since its adoption has been so often referred to by counsel in support of personal and property rights and been given such prominence by courts in adjudicating upon them as to leave the inference that it was a bran-new principle in the law.

The bar and bench seem to have forgotten that it was a part of ancient English liberties, confirmed by Magna Charta on the 19th day of June, 1215, which came to the people of the
86 United States as a part of the common law. Chapter 29 of Magna Charta declares that "no free man shall be taken or imprisoned, disseized from his freehold or liberties or immunities, nor outlawed nor exiled, nor in any manner destroyed, nor will we come upon him or send against him, except by legal judgment of his peer, or the law of the land."

This provision has been a fundamental rule in the judicial system of every State in the Union which has adopted the common law, and to deprive a person of his property except by "due process of law," or "by the law of the land," which means the same thing, would be illegal in the absence of the said fourteenth amendment.

The people have never delegated such authority to either the State or Federal Government.

The amendment, therefore, introduces no new principle into the administration of our municipal affairs; it is but declaratory of a rule which has existed beyond the memory of man and our judicature was builded upon it.

The question has never been either before or since the adoption of the said amendment whether the party could be deprived of his property without due process of law, but it has always been whether the act complained of came within that wholesome inhibition.

The latter inquiry is the one with which we have to deal in this case; it is whether the construction of said Tanner Creek sewer by the common council of the city of Portland and charging the cost thereof upon the lots and blocks owned by the respondents and others, which are claimed to be benefited by the sewer, without first giving such owners notice of its proposed construction, is depriving them of their property "without due process of law."

The question is one upon which the authorities are not in harmony, though I am satisfied that they largely preponderate in favor of the respondents' side of it; at least the cases which hold that notice to a party in some form must be given before his property can be charged with a burden in order that he may have an opportunity to contest the right to impose it or question the expediency of exercising it is more in consonance with my idea of justice.

87 And the very able opinion of Mr. Justice Earl, in Stewart *vs.* Palmer, 74 N. Y., 191, 30 Am. Rep., 289, furnishes cogent and convincing logic that a proceeding of the nature and character referred to would operate to deprive the party of property "without due process of law," but we cannot conclude that a proceeding under a legislative enactment authorizing a burden to be imposed upon

property without requiring notice to be given to the owner would necessarily have the effect mentioned without overruling a former decision of this court.

In Strowbridge *vs.* City of Portland, 8 Or., 67, the question of the necessity of notice in such cases was directly raised.

It was claimed in the brief of the appellants' counsel, which was prepared by Mr. Dell, that notice was a fundamental act, the absence of which rendered the assessment void.

The respondents' counsel, upon the contrary, insisted that while the common council had caused notice to be published in which it was stated that certain property would be assessed, it was a matter purely *ex gratia* and could not affect the cause; that the common council was under no obligation to give any notice or publish any resolution.

Judge Boise, who delivered the opinion of the court, at page 83 of the case used the following language:

" The elaborate manner pointed out in the charter for acquiring the authority to construct street improvements does not apply to the construction of sewers.

The latter may be laid when, in the judgment of the city council, the same shall be necessary.

They may be made without previous notice, the council alone being the judge of their necessity.

Sewers are required as a part of the sanitary regulations of the city to prevent the developement of local disorders and generally to preserve the public health.

It may and often does happen in populous towns that active measures have to be taken by city authorities in sanitary regulations, and it would not be wise to leave so important a power
88 often requiring the most prompt exercise to the tardy mode provided for inaugurating street improvements.

§ 106 (now § 121) alone provides for the manner of making drains and sewers.

The only question is, Has the city council promptly exercised its powers under such section ? "

The view here expressed by the learned judge may not accord with that entertained by the present members of this court. In the light of subsequent decisions, we might be inclined to hold differently, but a court is not always at liberty to enforce the personal opinions of its members. Due deference must be paid to the adjudications of their predecessors, more especially where a different course would interfere with property rights.

The decision in Strowbridge *vs.* City of Portland was made nearly nine years ago. It declared valid the identical provision of the charter of the city which is before us and under which all the sewers within the city have been constructed.

Upon the faith of that decision doubtless the proceedings complained of were instituted and an expenditure of thirty-five thousand dollars incurred in the construction of the said sewer, and to overrule it under the circumstances and pronounce void an act of the legislature under which the city for more than a quarter of a century has been carrying on extensive operations would create confusion and occasion injustice.

If the rule of *stare decisis* is applicable under any circumstances, I think it should certainly be applied in this case.

It cannot, it seems to me, be consistently asked of us that we pronounce so important a provision of a city charter void which this court by a solemn adjudication in a former case has held to be valid, whatever our holding might be if the question were *res integra.*

89 We had occasion under similar circumstances to apply the doctrine of *stare decisis* in the City of Corvallis *vs.* Stock, 12 Or., 391.

The question there was whether an appeal to the circuit court for the county of Benton would lie from a judgment of the recorder's court of the city for the violation of a city ordinance.

The circuit court, following Sellers *vs.* City of Corvallis, 5 Or., 273, sustained the appeal.

Upon an appeal to this court from that ruling it was contended by the appellants' counsel that Sellers *vs.* City of Corvallis has been overruled in Town of Lafayette *vs.* Clark, 9 Or., 225, in which it was held that an appeal would not lie from the judgment of a recorder of a city for the violation of a city ordinance unless the right was given by statute, and the court was of the opinion that there was no material difference between the Lafayette charter and the Corvallis charter upon that subject, and said that it would be inclined to hold that the latter charter did not provide for such appeal if it were not for the decision in Sellers *vs.* City of Corvallis.

That decision, we said, was rendered by judges occupying the same position we occupy, and while we did not endorse it nor regard the reasons upon which it was predicated as satisfactory, yet that we did not feel at liberty to depart from it in the particular case before us.

It would be better, no doubt, if all judicial decisions were made upon correct, logical principles; but that cannot be while intellectual infirmities exist, and experience has shown that it is less injurious to endure the evils of an unsound precedent than to change it when the result would cause confusion and disappoint and damage parties who have relied upon it as an established rule of law.

Upon the principle here indicated we feel constrained to adhere to the ruling as regards the question of notice made in Strowbridge *vs.* City of Portland, *supra.*

90 The respondents' counsel also objects to the said ordinances upon the ground that they do not provide for the levying of the assessments upon the property directly benefited, in accordance with the rule of law which requires assessments for local improvements to be laid in proportion to the special benefit received, over and above that general benefit experienced by the whole community.

The common council of the city, in section 5 of said ordinance No. 5068, declared that all the lots and blocks and parts of lots and blocks within the district before referred to would be directly benefited by said sewer and were subject to assessment therefor in proportion to the benefits received thereby, as provided in section 121 of the city charter of said city.

The subsequent ordinance, No. 5162, was adopted and the proceedings thereon had in order to estimate the proportionate share of the cost of such sewer to be assessed to the several owners of the property benefited thereby and to assess the same to such owners.

This subsequent ordinance and proceedings were evidently in pursuance of the prior ordinance and were an exercise of the authority vested in the said common council by said section 121 of the city charter.

Unless, therefore, the proceedings were in excess of the authority conferred by said section 121 or a fraudulent exercise of the use thereof, or the said section itself is void, said ordinances and proceedings cannot be attacked collaterally.

The counsel's contention, if I understand it correctly, is that assessments for local improvements can be levied only to the extent of the special benefit conferred by such improvements, and that all exactions beyond that is taking private property for public use without just compensation.

Said council do not claim that said section 121 of the charter is faulty in that particular, unless the meaning of it is that the property declared directly benefited shall bear the entire expense of the improvement, although in excess of the special benefit conferred.

91 Their claim is that declaring all the property within the sewer district directly benefited and subject to assessment to the extent of the cost of its construction, without prescribing any mode of determining such benefit, was illegal.

The result of the counsel's theory is that a municipal corporation has no authority to make a local improvement and charge the entire expense thereof upon the property benefited thereby unless it specially benefits the property to the amount of such expense.

That theory is, no doubt, correct. I do not think it can be correctly controverted; but who is to determine the question? Is it the board of directors of the corporation, or are the courts to determine it as a question of fact?

If we were to say the latter every case of local improvements would be liable to come into the courts, and there would be as many issues to determine as there were individual owners of property assessed; at least, I have never heard of one being satisfied with his assessment in such a case.

Again, how are the courts to determine such a question? Will they do it upon the testimony of witnesses called as experts to give their opinions as to whether the benefits to a lot assessed for such purposes is equal to the amount assessed thereon, the same as in cases of taking property for streets and highways?

Such a course could hardly be practical, and would only result in substituting in place of the judgment of the common council, who are elected on account of their supposed fitness for that duty, the opinions of a multitude of witnesses, many of whom would be personally interested in the controversy.

It may be said that as the circuit court, under the constitution of this State, has jurisdiction and supervisory control over inferior courts, officers, and tribunals, it has power to prevent a municipal corporation from inflicting a wrong upon a citizen by levying an unjust assessment upon his property.

92 This would doubtless be so where the officers of the corporation had usurped its functions or were engaged in perpetrating a fraud; but, on the other hand, if the courts were to undertake to control the discretion of the officers of a municipal government it would be a usurpation on their part.

The common council of the city of Portland is not required to prescribe a mode for determining the benefits to property accruing from local improvements.

In the case of the construction of a sewer it has authority to determine what property is directly benefited thereby, and to estimate the proportionate share of the cost of such sewer to be assessed to the several owners of the property thus benefited.

It exercises such authority as agent of the State and for the public good; and so long as it keeps within the scope of its power the courts have no control over it, nor jurisdiction in a collateral proceeding to question its acts.

If it were to attempt to assess property for the cost of constructing a sewer, so laid as to render it physically impossible to benefit the property, as in the case of Hanscom *vs.* The City of Omaha, 11 Neb., 37, it would exceed its authority, and it would be the duty of the courts to interfere and prevent the wrong from working injury; but where the property is directly benefited by the prosecution of such an enterprise and the common council has assessed what it deems a proportionate share of the costs upon the owner thereof, the courts are not authorized to institute an inquiry in order to ascertain whether or not the assessment exceeds the benefits. Such a practice would lead to interminable litigation.

The legislature has adopted the course prescribed in section 121 of the charter for laying down sewers; it has not provided any mode for estimating the value of the benefits conferred whereby they may be compared with the amount of the assessments, for the reason, I suppose, that the former are presumed in all cases to exceed the latter. Indeed, it would be very difficult to establish by proof the extent of the value of improvements of that character.

93 Every one knows that a sewer in a densely populated part of a city is a necessity, and that the property there would be of no comparative value without it.

The primary object of such an improvement is to confer a special benefit upon the property-owner.

The nature of this class of improvements is well described in State *vs.* City of Newark, 3 Dutch., 135, in which the court at pages 188 and 189 says: "There are in the legislation of every state a variety of statutes, whose primary design is the improvement of private property, and in which the public interest is merely incidental.

To effectuate the object of these laws they authorize assessments in the nature of taxes upon individual property and direct the mode of enforcing them.

Of this nature are many statutes, public and private, in relation to the reclaiming of drowned lands and the draining and fencing of swamp- and meadows.

The immediate design of these acts is the improvement of private property, each individual interested being required to contribute to the expense in proportion to his interest in the property, and to the benefit supposed to be conferred upon him.

The public are interested in this class of improvements only as they tend to improve the salubrity of particular districts or to increase the general wealth of the community.

These assessments have little analogy to public taxes, either in the purpose for which they are assessed or in the mode of enforcing them.

So, a city ordinance requiring every lot-holder to drain the surface water from his lot to avoid the creation of a nuisance affecting the public health, and in case of a failure directing it to be done at public expense and the amount to be a lien on the respective lots, though the design be purely a public benefit, savors more of a mere police regulation than a measure of taxation."

94 I can discover no inherent defect in the charter in regard to the mode of assessment of the cost of sewers.

The common council only has power under it to lay down necessary sewers, and I think this court has the right to presume that, when a sewer is necessary, its benefits to the property which it is intended to accommodate will be in excess of the expense incurred in its construction.

Nor was the ordinance establishing the sewer in question and declaring that the property within the sewer district referred to would be directly bemefited by the sewer and providing for estimating the proportionate share of the cost thereof to be assessed to the several owners of the property void, unless it be shown that in consequence of the location of the property it was impossible for it to receive any benefit therefrom.

The respondents allege in their complaint that their property or any part of the same had not been benefited and would not be benefited by the sewer.

This allegation is a mere conclusion.

Whether their property had not been benefited or would not be benefited by the sewer must be shown by facts alleged. They do not allege in a subseqent part of their complaint that certain of their property within the said district assessed for the construction of the said sewer was at a level so low that it was impracticable to drain the same into the sewer.

That is a fact which, if established by proof, might entitle the owners of such property to relief against the assessment. Owners of property assessed a proportionate share of the cost of a sewer, who cannot in consequence of its physical location be benefited thereby, are entitled to relief against such assessment; but I do not think they have the right to join as plaintiffs in a suit to obtain relief, as the assessment and attempted enforcement of it are the grounds of the complaint, and as respects each owner are several in their nature, are distinct acts.

95 Under this view the demurrer to the complaint should have been sustained.

The decree appealed from will therefore be reversed and the cause remanded to the circuit court, with directions to sustain the demurrer, and for such other proceedings as are consistent with the rules of law in such cases.

96 Petition for rehearing. Filed October 11, 1888.

Opinion by THAYER, *C. J.*:

It has been held by courts of good standing that improvements, such as the construction of drains and sewers, might be made and the cost thereof assessed upon the owners of adjacent property without formal notice to them of the proposed improvement.

The ground- upon which such decisions are maintainable, if at all, are that the act is but the exercise of the taxing power of the State, and *as* the State, when it deems it necessary for the health and comfort of the community that such improvements be made and the adjacent property will be benefited thereby, may directly cause it to be made without previous notice to the parties affected.

It can delegate to a municipal corporation, as its agents, the same power without requiring it to give such notice as a condition of the exercise of the power.

Whether such view is strictly correct or not we have not undertaken to determine.

This court, as shown in our opinion delivered herein, held several years since that such authority could be exercised without previous notice, upon the faith of which important affairs have been transacted, creating rights and establishing relations that would be disturbed, to the great annoyance of the public, if that decision were overturned. In view of that fact we feel bound to adhere to the previous ruling upon the question, whatever our views might be regarding it if *res nova*.

The petition for a rehearing must be denied.

97 Opinion by STRAHAN, *J.*:

I concurred in the affirmance of the decree in this case and also in the order overruling the petition for a rehearing on grounds somewhat at variance from those stated in the opinion, and which, I think, I ought to indicate briefly.

The plaintiffs were not active nor prompt in complaining of those assessments.

So far as appears they remained passive and indifferent spectators during all the time the city was engaged in assuming liabilities in the construction of the sewer. Had they been prompt in complaining and in averting the action of the city before the liabilities were incurred and the work substantially completed it seems to me they would have occupied a more favorable light in a court of equity.

I do not say that this apparent laches would close the door of a court of equity against them in a case free from doubt, but it requires the court to examine their claim somewhat more critically than it would otherwise be inclined to do.

The ordinances relating to this sewer were duly published in the official newspaper of the city of Portland. This of itself may not amount to technical notice to the plaintiff of what the city was doing, yet there is authority for holding that the members of a corporation are bound to take notice of its laws.

(Inhabitants of Palmyra *vs.* Morton, 25 Mo., 593.)

But, however this may be, it appears from Appendix "A," annexed to the plaintiffs' amended complaint, that the viewers appointed by ordinance No. 5068 to estimate the proportionate share of the cost of said sewer to be assessed to the several owners of property benefited gave notice of their first stated meeting, which was on June 25, 1887, at 6.30 o'clock p. m. of said day, by publication in the Daily News, the official paper of the city, at which they met
and proceeded with their work, adjourning from day to day
98 until the final completion of their labors.

The object of this notice was to enable every person interested to be present and defend his rights before the viewers; to make such representations and statements before them as his interest might require or the facts justify, and, if the law were improperly applied in any particular instance, the party injured had his remedy by writ of review to correct the same.

(People *ex rel.* Citizens' Gas Light Company of the City of Brooklyn *vs.* Board of Assessors of the City of Brooklyn, 39 N. Y., 81; Kennedy *vs.* City of Troy, 77 N. Y., 493; Le Roy *vs.* Mayor, etc., 20 Johns., 430; 11 Am. Dec., 289; Heywood *vs.* City of Buffalo, 14 N. Y., 534; Western R. R. Co. *vs.* Nolan *et al.*, board of assessors of the city of Albany, 48 N. Y., 513; Rhea *vs.* Umatilla Co., 2 Or., 298; Poppleton *vs.* Yamhill Co., 8 Or., 338; Oregon and W. M. Savings Bank *vs.* Jordan, 16 Or., 113.)

But it is objected that neither the charter nor ordinance expressly provides for notice, and that therefore, though notice may have been in fact given, the constitutional objection of want of notice is not met.

§§ 95, 96, 97, 98, and 99 of the charter all provide for and regulate notice in case of improvement of streets, and § 121, which authorizes sewers, provides, among other things, "and when the council shall direct the same (costs) to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in the case of street assessments."

The charter expressly provides for notice in case of street assessments, and § 121 makes the provisions applicable in case of sewers where the expense is ordered by the council to be made a charge on the property directly benefited. In addition to this, § 12 of ordinance No. 5068 provides that the viewers shall hold stated meetings at the office of the auditor and clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimates.

99 I think it would be a reasonable construction of this ordinance to hold that the right to be heard implies that notice shall be given, and, if this be so, the ordinance does provide for notice by necessary implication.

That which is implied in a statute is as much a part of it as what is expressed.

(Minard *vs.* Douglas Co., 9 Or., 206.)

This view of the subject, it seems to me, fully satisfies the constitutional requirements insisted upon by counsel for appellants.

In Hildreth *vs.* City of Lowell, 11 Gray, 345, the ordinance alone provided for notice, which was given, and this was held sufficient.

And Williams *vs.* Mayor, etc., of Detroit, 2 Mich., 560, is to the same effect.

Lord, J., was for a rehearing.

100 In the Supreme Court of the State of Oregon.

JOHAN PAULSEN *et al.*
—
THE CITY OF PORTLAND *et al.*

Whereas the above-named plaintiffs are about to appeal the above-entitled cause to the Supreme Court of the United States, it is hereby stipulated and agreed between the parties hereto that the transcript to be certified to the said Supreme Court of the United States by the clerk of the supreme court of this State shall consist of a copy of the amended complaint and the demurrer and all of the other papers and proceedings in the cause, including the opinions of the supreme court, excepting only the tabulated statements in ordinance No. 5162, Appendix B, which said tabulated statement is to be omitted from said transcript.

Dated August 23, 1889.

WILLIAMS & WOOD,
*Att'ys for Pl'ffs.*
W. H. ADAMS,
*Attorney for Defendant-, City of Portland et al.*

101 [Endorsed:] In the supreme court of the State of Oregon. Johan Paulsen *et al. vs.* The City of Portland *et al.* Stipulation. Williams & Wood, att'ys for Johan Paulsen *et al.* W. H. Adams, att'y for def'ts, City of Portland *et al.*

102 In the Supreme Court of the State of Oregon.

JOHAN PAULSEN *et al.*
*v.*
THE CITY OF PORTLAND *et al.*

It is hereby stipulated and agreed between the parties, through their respective attorneys, that the map of the district assessed, known as Appendix "D" to the amended complaint, need not be included in the transcript to be sent to the Supreme Court of the United States on the appeal thereto from this court, and that this stipulation shall be deemed to waive any necessity for including it therein.

Sept. 17, 1889.

WILLIAMS & WOOD,
*Att'ys for Plaintiffs.*
W. H. ADAMS,
*City Attorney, of Attorneys for Defendants.*

103 [Endorsed:] Supreme court, State of Oregon. Johan Poulsen *et al.* *v.* The City of Portland *et al.* Stipulation. Filed Aug. 18, 1889. W. H. Holmes, clerk, per —— ——, deputy.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law and equity in said State in which a decision could be had in said suit between Johan Paulsen, A. Alfreds, J. J. Allard, Alfred Anderson, John Anderson No. 1, John Anderson No. 2, O. H. Anderson, F. A. Anderson, C. R. Andrichke, F. Backmann, C. P. Bacon, George Bants, John Barrett, G. W. Bates, Sam. L. Beary, John Berg, Mary E. Biles, Mrs. A. E. Bills, Mrs. A. M. Bills, F. Bleid, L. Boire, E. Bollam, Ellen Barbare, A. E. Borthwick, Otto Bourne, Mrs. L. E. Bradley, Thomas Brazel, P. E. Brigham, Mrs. Joseph Brinckerhoff, Felicia Brown, H. Brown, J. Burnham, W. J. Burns, Thomas W. Burton, T. Callahan, D. F. Campbell, M. Campbell, Edward Campion, S. Carney, H. P. Christensen, J. Closset, D. Coman, M. Connertin, M. Connerton, H. W. Corbett, Mary H. Couch, George W. Cummings, William Dineen, T. Dineen, Charles H. Dodd, John 105 Dougherty, Anna E. Dowell, Fannie Dowell, A. Drange, Jerry Driscoll, A. Driver, A. Droix, Anna Mary Erkkola, Joseph Ewen, P. J. Fay, A. Ferrera, L. Fleischner, John R. Foster, William Frazer, William Frazer and L. P. W. Quimby, tenants in common, assessed for the purpose of taxation on the books of the defendant The City of Portland as Frazer & Quimby; R. D. Freeborn, M. Fried, Ellen Gaffney, James Garson, J. K. Gill, L. W. Gilliland, D. Gerard, J. W. Going, Elizabeth Good, George Good, John Gorman, William H. Gross, John Gustafson, N. J. Hammel, A. J. Hanlan, Simon Harris, L.

Hexter, L. N. Hilliland, Sol. Hirsch, L. Hoffman, Maria Hornung, George W. Hoyt, R. Irving, Mrs. S. Irving, Lena W. Jacobson, William Jacobson, Lily A. James, Lily A. James, guardian of George V. James, an insane person; Joseph Jaskolla, Mary Jenkins, T. Johnson, John Kiernan, R. B. Knapp, R. Knoll, Philip Kohl, M. Koshland, J. Krumbein, Louis Larsen, Felix Laurent and Eugene Pierard, tenants in common, assessed for the purpose of taxation on the books of the defendant The City of Portland as Lorens & Pierard; George Lawrence, D. Lefevre, C. Leonard, C. H. Lewis, L. H. Lewis, Theo. H. Liebe, engaged in business under the firm name of Theo. H. Liebe & Co.,
106 W. L. Lightner, Charles Logus, James Lotan, Mary Lowe, P.
Lowengart, C. Madigan, Ann Manning, T. R. Manning, C. O. Maren, Sarah E. Marshall, Paul Merrick, George Moore, John B. Morgan, Mary Mulvaney, Honora L. Murphy, John Murta, D. Mackay, P. McFeeley, Mary McGowan, Catherine McGrath, Matilda C. McIntosh, Kenneth A. J. McKenzie, Ryan S. McLeran and Frank McLeran, partners in business as McLeran Brothers; Abbie McNeil, Maria Naucke, O. W. Nelson, Maria Newstead, August Noffke, W. Noon, Emil Nordstrom, The Norwegian-Danish Church, a corporation organized and existing under the laws of the State of Oregon and assessed for the purpose of taxation in the books of the defendant The City of Portland as the Scandinavian church; D. O'Brien, Mrs. Mary T. O'Brien, T. J. O'Brien, Johanna O'Connor, Thomas O'Connor, the owner of certain property in the district mentioned in the complaint, assessed for the purpose of taxation in the books of the defendant The City of Portland as the property of P. C. Smith; H. G. O'Neill, J. J. O'Neill, John F. O'Shea and James B. O'Shea, partners in business under the firm name of O'Shea Brothers; The Oregon Transfer Company, a corporation organized and existing under the laws of the State of Oregon; Alex. E. Osmond, Catherine Osmond, Christiana Osmond, A. J. Owen,
107 P. L. Owen, Mary Perrault, Johan Paulsen, Pat. Powers, A.
Prager, J. Prideaux, L. P. W. Quimby, Albert Rahles, J. P. Rasmussen, Agnes Reid, E. J. Richards, Frank Richet, Thomas Richet, and Thomas Richet, Jr., partners in business under the firm name of Richet Brothers & Company; Mrs. Sarah Rosenfeld, Anna S. Ryan, Louis Sechtien, Louis Sechtem, M. Seller, J. F. Shea, C. S. Sherer, P. H. Schuldermann, J. Slaughterback, George R. Smith, Mary A. Smith, Max Smith, Mary E. Spaulding, W. W. Spaulding, M. M. Spaulding and Thomas Papworth, partners in business under the firm name of Spaulding & Papworth; Joseph Spencer, James Steel, B. L. Stone, John Storan, L. Terry, J. S. Thomas, Mrs. M. S. Thornton, C. Tockle, H. Trenkmann, Mary B. Trevitt, D. S. Tuthill, Thomas Varwig, Fanny Wallace, H. W. Wallace, Carrie W. Wallace, W. R. Wallace, John E. Walsh, P. Wassinger, A. Waterford, William Waterford, George W. Weidier, H. Weinhard, Thomas Whalen, John Wilhelm, The Willamette Steam Mill, Lumbering and Manufacturing Company, a corporation organized and existing under the laws of the State of Oregon; Anna M. Williams, Kate Williams, Mrs. C. E. Wilson, H. C. Wilson, J. K. Wilson, and Theodore Wygant, plaintiffs, against The City of Port-

land, John Gates, mayor of said city; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, 108 Tyler Woodward, F. Hacheney, William Fliedner, and John Gates, composing the common council of said city, and Samuel B. Parrish, chief of police of said city, defendants, wherein was drawn in question the validity of a statute and also of an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of their validity, a manifest error has happened, to the great damage of the said above-named plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct 109 that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, on the 2d day of Sept., in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
*Clerk U. S. Circuit Court, Oregon,*
By D. W. STEVENS,
*Deputy.*

Allowed by W. W. Thayer, the chief justice of the supreme court of the State of Oregon.

W. W. THAYER,
*Chief Justice Supreme Court, Oregon.*

110 [Endorsed:] Supreme Court of the United States. Johan Poulsen *et al.*, plaintiffs in error, *vs.* The City of Portland *et al.*, defendants in error. Writ of error. Filed Aug. 11, 1889. W. H. Holmes, clerk, per —— ——, deputy.

111 *Citation.*

United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Oregon, wherein Johan Paulsen, A. Alfreds, J. J. Allard, Alfred Anderson, F. A. Anderson, John Anderson (No. 1), John Anderson (No. 2), O. H. Anderson, C. R. Andrichke, F. Buckman, C. P. Bacon,

George Bants, John Barrett, G. W. Bates, Sam. L. Beary, John Berg,
Mary E. Biles, Mrs. A. E. Bills, Mrs. A. M. Bills, F. Bleid, L. Boire,
E. Bollam, Ellen Barbare. A. E. Borthwick, Otto Bourne, Mrs. S.
E. Bradley, Thomas Brazel, P. E. Brigham, Mrs. Joseph Brinckerhoff,
Felicia Brown, H. Brown, J. Burnham, W. J. Burns, Thomas
W. Burton, T. Callahan, D. F. Campbell, M. Campbell, Edward
Campion, S. Carney, H. P. Christensen, J. Closset, D. Coman, M.
Connertin, M. Connerton, H. W. Corbett, Mary H. Couch, George
W. Cummings, William Dineen, T. Dineen, Charles H. Dodd, John
Dougherty, Anna E. Dowell, Fannie Dowell, A. Drange, Jerry Driscoll,
A. Driver, A. Droix, Anna Mary Erkkola, Joseph Ewen,
112 P. J. Fay, A. Ferrera, L. Fleischner, John R. Foster, William
Frazer, William Frazer and L. P. W. Quimby, tenants in
common, assessed for the purpose of taxation on the books of the
defendant The City of Portland as Frazer & Quimby; R. D. Freeborn,
M. Fried, Ellen Gaffney, James Garson, J. K. Gill, L. W. Gilliland,
D. Gerard, J. W. Going, Elizabeth Good, George Good, John
Gorman, William H. Gross, John Gustafson, N. J. Hammel, A. J.
Hanlan, Simon Harris, L. Hexter, L. N. Hilliland, Sol. Hirsch, L.
Hoffman, Maria Hornung, George W. Hoyt, R. Irving, Mrs. S. Irving,
Lena W. Jacobson, William Jacobson, Lily A. James, Lily A.
James, guardian of George V. James, an insane person; Joseph
Jaskolla, Mary Jenkins, T. Johnson, John Kiernan, R. B. Knapp,
R. Knoll, Philip Kohl, M. Koshland, J. Krumbein, Louis Larson,
Felix Laurent and Eugene Pierard, tenants in common, assessed
for the purpose of taxation on the books of the defendant The City
of Portland as Lorens & Pierard; George Lawrence, D. Lefevre, C.
Leonard, C. H. Lewis, L. H. Lewis, Theo. H. Liebe, engaged in business
under the firm name of Theo. H. Liebe & Co.; W. L. Lightner,
Charles Logus, James Lotan, Mary Lowe, P. Lowengart, C. Madigan,
Ann Manning, T. R. Manning, C. O. Maren, Sarah E.
Marshall, Paul Merrick, George Moore, John B. Morgan,
113 Mary Mulvaney, Honora L. Murphy, John Murta, D. Mackay,
P. McFeeley, Mary McGowan, Catherine McGrath, Matilda
C. McIntosh, Kenneth A. J. McKenzie, Ryan S. McLeran and Frank
McLeran, partners in business as McLeran Brothers; Abbie McNeil,
Maria Naucke, O. W. Nelson, Maria Newstead, August Noffke, W.
Noon, Emil Nordstrom, The Norwegian-Danish Church, a corporation
organized and existing under the laws of the State of Oregon
and assessed for the purpose of taxation in the books of the defendant
The City of Portland as the Scandinavian church; D.
O'Brien, Mrs. Mary T. O'Brien, T. J. O'Brien, Johanna O'Connor,
Thomas O'Connor, the owner of certain property in the district
mentioned in the complaint, assessed for the purpose of taxation in
the books of the defendant The City of Portland as the property
of P. C. Smith; H. G. O'Neill, J. J. O'Neil, John F. O'Shea and
James B. O'Shea, partners in business under the firm name of
O'Shea Brothers; The Oregon Transfer Company, a corporation organized
and existing under the laws of the State of Oregon; Alex.
E. Osmond, Catherine Osmond, Christiana Osmond, A. J.
114 Owen, P. L. Owen, Mary Perrault, Johan Paulsen, Pat. Powers,

A. Prager, J. Prideaux, L. P. W. Quimby, Albert Rahles, J. P. Rasmussen, Agnes Reid, E. J. Richards, Frank Richet, Thomas Richet, and Thomas Richet, Jr., partners in business under the firm name of Richet Brothers & Company; Mrs. Sarah Rosenfeld, Anna S. Ryan, Louis Sechtien, Louis Sechtem, J. F. Shea, C. S. Sherer, P. H. Schulderman, J. Slaughterback, George R. Smith, Mary A. Smith, Max Smith, Mary E. Spaulding, W. W. Spaulding, M. M. Spaulding and Thomas Papworth, partners in business under the firm name of Spaulding & Papworth; Joseph Spencer, James Steel, B. L. Stone, John Storan, L. Terry, J. S. Thomas, Mrs. M. S. Thornton, C. Tockle, H. Trenkmann, Mary B. Trevitt, D. S. Tuthill, Thomas Varwig, Fanny Wallace, H. W. Wallace, Carrie W. Wallace, W. R. Wallace, John E. Walsh, P. Wassinger, A. Waterford, William Waterford, Geo. W. Weidler, H. Weinhard, Thomas Whalen, John Wilhelm, The Willamette Steam Mill, Lumbering and Manufacturing Company, a corporation organized and existing under the laws of the State of Oregon; Anna M. Williams, Kate Williams, Mrs. C. E. Wilson, H. C. Wilson, J. K. Wilson, and Theodore
115 Wygant are plaintiffs in error and you, The City of Portland, John Gates, mayor of said city; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hacheney, William Fliedner, and John Gates, composing the common council of said city, and Samuel B. Parrish, chief of police of said city, are defendants in error, to show cause, if any there be, why the judgment and decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. W. Thayer, chief justice of the supreme court of the State of Oregon, this 2d day of Sept., in the year of our Lord one thousand eight hundred and eighty-nine.

W. W. THAYER,
*Chief Justice of Oregon.*

U. S. AMERICA,
*State of Oregon,* } *ss:*

Due and legal service of the above citation admitted.

W. H. ADAMS,
*Attorney for the Defendants and City Attorney for the City of Portland.*

116 [Endorsed:] Supreme court of the United States. Johan Poulsen *et al.*, plaintiffs is error, *vs.* The City of Portland *et al.*, defendants in error. Citation. Filed Aug. 11, 1889. W. H. Holmes, clerk, per —— ——, deputy.

117 Supreme Court of the United States.

JOHAN POULSEN *et al.*, Plaintiffs in Error,
*vs.*
THE CITY OF PORTLAND *et al.*, Defendants in Error.

Know all men by these presents that we, Johan Poulsen and L. A. Lewis, of Portland, in the State of Oregon, are held and firmly bound unto The City of Portland, John Gates, mayor of said city; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hacheny, William Fliedner, and John Gates, composing the common council of said city, and Samuel B. Parrish, chief of police of said city, all of Portland, in the State of Oregon, in the sum of five hundred dollars, to be paid to the said The City of Portland, John Gates, mayor of said city; R. Gerdes, J. J. Gallagher, G. Castendieck, R. H. Schwab, S. Farrell, C. M. Forbes, Tyler Woodward, F. Hacheny, William Fliedner, and John Gates, composing the common council of said city, and Samuel B. Parrish, chief of police of said city, or their successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 2nd day of September, 1889.

Whereas the above-named Johan Poulsen and others
118 have prosecuted a writ of error in the Supreme Court of the
United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Oregon:

Now, therefore, the condition of this obligction is such that if the above-named Johan Poulsen and others shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

JOHAN POULSEN. [SEAL.]
L. A. LEWIS. [SEAL.]

Sealed and delivered in presence of—
J. C. FLANDERS.

UNITED STATES OF AMERICA,
*District of Oregon,* } *ss:*

I, L. A. Lewis, being duly sworn, depose and say that I am worth the sum of one thousand (1,000) dollars over and above all my just debts and liabilities.

L. A. LEWIS.

Subscribed and sworn to before me this 2nd day of September, 1889.

[Seal J. C. Flanders, Notary Public, State of Oregon.]

J. C. FLANDERS,
*Notary Public in and for the State of Oregon.*

I approve the above bond and the sufficiency of the surety thereto.

W. W. THAYER,
*Chief Justice Supreme Court, State of Oregon.*

119 [Endorsed:] In the Supreme Court of the United States. Johan Poulsen *et al.*, plaintiffs in error, *vs.* The City of Portland *et al.*, defendants in error. Undertaking for costs. Filed Aug. 11, 1889. W. H. Holmes, clerk, per —— ——, deputy.

120 UNITED STATES OF AMERICA.

STATE OF OREGON, } *ss:*
*County of Marion,* }

I, W. H. Holmes, clerk of the supreme court of the State of Oregon, do hereby certify that the foregoing transcript of the amended complaint (save that portion thereof mentioned in the stipulation of the parties and herewith returned), together with the copy of the demurrer interposed to said amended complaint, the decree of the circuit court of Multnomah county in relation thereto, the first decree of the supreme court of the State of Oregon in said cause, the order of said supreme court remanding said cause to the said circuit court, the final decree of said circuit court in the said cause, the appeal to the said supreme court from said final decree of the said circuit court, the final decree of the said supreme court affirming the decree of the said circuit court, and the opinion of the said supreme court, in the cause entitled Johan Paulsen *et als.*, plaintiffs and appellants, *versus* The City of Portland *et als.*, defendants and respondents, together with the stipulations and other papers in said cause filed, have been by me compared with the original papers, copies of which the said transcripts purport to be, and that said copies are true and correct transcripts of such originals and the whole thereof, and that they constitute the copies of the papers used on the hearing of said cause in the said supreme court on the last hearing thereof, to wit, on the 13th day of March, 1889.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city of Salem, said county and State, this 19th day of September, A. D. 1889.

[Seal Supreme Court, State of Oregon.]

W. H. HOLMES,
*Clerk said Supreme Court.*

[Endorsed:] No. —. In the supreme court of the State of Oregon, March term, 1889. Johan Poulsen *et als. vs.* The City of Portland *et als.*

Endorsed on cover: Case No. 13,773. Oregon supreme court. No. 183. Johan Paulsen, A. Alfreds, J. J. Allard, Alfred Anderson, *et al.*, plaintiffs in error *vs.* The City of Portland, John Gates, mayor, *et al.* Filed October 15, 1889.

183 149 U S 38

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JAMES H. McKENNEY,
CLERK.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

October Term, 1892.

JOHAN PAULSEN, A. ALFREDS,
J. J. ALLARD, ALFRED ANDERSON, ET AL.,
Plaintiffs in Error,
v.
THE CITY OF PORTLAND; JOHN GATES, MAYOR; ET AL.,
Defendants in Error.

No. 13773.

## Brief for Plaintiffs in Error.

GEO. H. WILLIAMS,
*Of Counsel for Plaintiffs in Error.*

WILLIAMS & WOOD,
*Attorneys for Plaintiffs in Error.*

C. W. HODSON, PRINT, 130 FRONT ST., PORTLAND, OREGON.

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

October Term, 1892.

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| JOHAN PAULSEN, A. ALFREDS, J. J. ALLARD, ALFRED ANDERSON, ET AL., Plaintiffs in Error,<br>v.<br>THE CITY OF PORTLAND; JOHN GATES, MAYOR; ET AL., Defendants in Error. | No. 13773. |

## Brief for Plaintiffs in Error.

## STATEMENT OF THE CASE.

This is a suit to enjoin the collection of certain assessments levied for the construction of a sewer in the city of Portland, Oregon. Plaintiffs in error filed their bill in the state Circuit Court for Multnomah county, to which the defendants, the City of Portland, its mayor and common council, interposed a demurrer. This demurrer was overruled by the circuit court, whereupon the defendants appealed to the Supreme Court of the state, where the decision of the court below was reversed, and the case remanded for further proceedings. An amended bill was filed by plaintiffs in error, to which the defendants again demurred, and the demurrer was sustained, and an order entered dismissing the bill. From that decision plaintiffs in error appealed to the Supreme Court of the state, where the decision of the court below dismissing the bill was affirmed; and from that decision an appeal has been taken to this court.

Plaintiffs in error allege that they are owners of certain blocks and lots in the city of Portland, Oregon, upon which assessments have been made for the construction of a sewer along Tanner creek, and then state as follows:

"Said charges or assessments, docketed in the docket of city liens as aforesaid, unlawfully encumber the titles which plaintiffs have in and to said property respectively, and if said charges be permitted to so remain and encumber said titles or any of them, or if said taxes so levied as aforesaid be collected, or if any attempt be made to collect the same, or to sell said property or any part thereof as aforesaid, plaintiffs will suffer great and irreparable damage and injury." *(Record, page 18.)*

Section 103 of the charter of the city of Portland is as follows:

"The docket of city liens is a public writing, and the original or certified copies of any matter authorized to be entered therein are entitled to the force and effect thereof, and from the date of the entry therein of an assessment on a lot or part thereof, the sum so entered is to be deemed a tax levied and a lien thereon, which lien shall have priority over all other liens or encumbrances thereon whatever." *(Oregon Session Laws 1882, page 168.)*

These assessments were made pursuant to two ordinances of the city, numbered respectively 5068 and 5162. *(Record, pages 20-25.)* As to these ordinances, the bill alleges as follows:

"Said ordinance numbered 5068, approved March 5th, 1887, is unconstitutional and void, in this:

"Sec. 121 of chapter 10 of the charter of the said city of Portland, providing for the construction of sewers, under and by virtue of which said ordinance numbered 5068 was passed, is in violation of the 14th amendment to the constitution of the United States, as it provides for taking private property for public use without due process of law; and said ordinance numbered 5068 is also unconstitutional and void, as it determines arbitrarily and absolutely that the property therein described is benefited by said Tanner creek sewer, without giving to the owners of said property any notice or opportunity to be heard upon that question.

"Said ordinance numbered 5162, approved August 19, 1887, is unconstitutional and void upon the same grounds as those upon which said ordinance numbered 5068 is unconstitutional and void as aforesaid, and also because said ordinance numbered 5162 provides for an assessment of the property therein named for the construction of said Tanner creek sewer without providing for any notice to the owners whose property is therein and thereby assessed.

"Said ordinances and each of them and said assessments were and are unconstitutional, illegal, and void because—and these plaintiffs aver the fact to be as now stated—plaintiffs had not nor had any of them any notice of said proceedings of the said common council or any opportunity to be heard as to whether or not their property or the property of any of them was or could be benefited by said sewer, or as to the amount that was or should be assessed upon the several parcels of property named in said ordinance numbered 5162.

"Said ordinances and each of them, and said assessment, were and are illegal and void for the reason—and these plaintiffs aver the fact to be—that said common council and the said viewers and each of them knew that a large proportion of the property described in said ordinances, including the property of these plaintiffs, was and is a long distance away from said Tanner creek sewer, and never would or could be benefited by said sewer, and that a considerable portion of said property was lower in elevation than the bottom of said sewer, and that it was physically impossible for said property to be drained into said sewer or to be benefited by it in any way.

"And said ordinances and assessments and each of them were and are a gross abuse of power by said common council and in fraud of the rights of these plaintiffs.

"Said assessment is illegal and void and in violation of § 121 of chapter 10 of the charter of the said city of Portland because—and these plaintiffs aver the fact to be—that said assessment was not made upon the property directly benefited by said sewer, but was made indiscriminately upon a large section of the city of Portland, and without reference to the benefits to the property therein contained." *(Record, page 17.)*

Section 121 of the charter above referred to is as follows:

"The council shall have the power to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer, but the mode of apportioning estimated costs of improvement of streets, prescribed in sections 112 and 113 of chapter 10 of this act, shall not apply to the construction of such sewers and drains; and when the council shall direct the same to be assessed on the property directly benefited, such expense shall, in every other respect, be assessed and collected in the same manner as is provided in the case of street improvements: *Provided*, That the council may, at its discretion, appoint three disinterested persons to estimate the proportionate share of the cost of such sewer or drain to be assessed to the several owners of the property benefited thereby, and in the construction of any sewer or drain in the city shall have the right to use and divert from their natural course any and all creeks or streams running through the city into such sewer or drain." *(Oregon Session Laws, 1882, page 171.)*

No provision is made in said section 121 or in any other section of the city charter for notice to property-owners that their property will be included in an assessment district, nor is any provision made in said charter for any notice as to the time, place or amount of any assessment for sewer purposes; and, so far as the city charter is concerned, the property-owners have no opportunity to be heard at any time or place in reference to their liability or the extent of their liability for the construction of sewers in the city of Portland.

Section 5 of Ordinance 5068, after describing the course of the sewer and defining the boundaries of the district to be sewered, enacts as follows:

"Said lots and blocks and parts of lots and blocks aforesaid are hereby declared to be directly benefited by such sewer and subject to assessment therefor, in proportion to the benefits recovered thereby, as provided in section 121 of the city charter of said city." *(Record, page 22.)*

Section 12 of said ordinance is as follows:

"That R. L. Durham, Charles G. Schramm and H. W. Monnastes, disinterested persons, be and they are hereby appointed viewers to estimate the proportionate share of the cost of said sewer to be assessed to the several owners of property benefited thereby, in accordance with the provisions of section 121 of the charter of said city and report the same to the common council within sixty days from the date of the approval of this ordinance by the mayor. Said viewers shall hold stated meetings in the office of the auditor and clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimate."

Ordinance 5162 is as follows:

"THE CITY OF PORTLAND DOES ORDAIN AS FOLLOWS:

"Section 1. The common council of the city of Portland having by ordinance No. 5068 provided for the construction of a sewer, together with the necessary catch-basins, man-holes, lamp-holes and branches along Tanner creek from North Fourteenth and B streets to North Tenth and H streets, thence along North Tenth street to I street, thence along I street to North Eighth street, and thence along North Eighth street to North Front street, and thence northeasterly to low water in the Willamette river, and having therein and thereby appointed three disinterested freeholders, viz.: R. L. Durham, H. W. Monnastes, and Charles G. Schramm, to estimate the proportionate share of the cost of such sewer, to be assessed to the several owners of the property benefited thereby, and said assessors having made their report to the common council, which report, being satisfactory, is hereby adopted, said report being in words and figures as follows, towit:

" '*To the Hon. the Common Council of the City of Portland:*

" 'Gentlemen: The undersigned appointed by your honorable body to assess the cost of constructing a brick sewer along Tanner creek from North 14th and B street to North 10th and H streets, thence along North 10th street to I street, thence along I street to North Eighth street, thence along North Eighth street to North Front street, thence northeasterly to low water in the Willamette river, as provided by ordinance No. 5068, would respectfully beg leave to submit this our report.

" 'We met at the office of the auditor and clerk, and were furnished with the plans, specifications, and contract, form which we have ascertained the probable costs to be $35,652.20, thirty-five thousand six hundred and fifty-two and 20-100 dollars.

"'In accordance with the requirements of said ordinance No. 5068, we gave notice of our first stated meeting June 25th, 1887, at 6:30 o'clock p. m. (by publication of such notice in the *Daily News*, the official paper of the city), at which time we met and proceeded with our work, adjourning from day to day until the final completion of our labors. We have assessed the cost of constructing said sewer to the several lots, parts of lots, and tracts of land included within the boundaries defined by you in your ordinance No. 5068 in the several amounts as shown by the following tabulated statement:'

*(Statement omitted by stipulation.)*

"Section 2. The auditor and clerk is hereby directed to enter a statement of the assessment hereby made in the docket of the city liens, and cause notice thereof to be published in the manner provided by the city charter.

"Passed the common council Aug. 17th, 1887.

"W. H. WOOD, Auditor & Clerk.
"JOHN GATES, Mayor.

"Approved August 19th, 1877." *(Record, p. 25.)*

Ordinance 5068 makes no provision for notice. Ordinance 5162 recites that notice of the first stated meeting of the assessors was given in a newspaper; but this notice was not authorized by any law or ordinance, nor was it directed to anybody, nor did it specify any place where the assessors were to meet, or the object of the meeting, or that persons interested would be heard by said assessors.

## ASSIGNMENT OF ERRORS.

The Supreme Court of Oregon erred in holding and deciding that section 121 of the city charter of the city of Portland, in said state, was not unconstitutional and not a violation of the fourteenth amendment to the constitution of the United States.

Said Supreme Court also erred in holding and deciding that the ordinances numbered respectively 5068 and 5162 of the said city of Portland were not unconstitutional and not a violation of the fourteenth amendment to the constitution of the United States.

Said Supreme Court also erred in affirming the decree of the state Circuit Court dismissing the bill of plaintiffs in error, and in ordering judgment against them for the costs and disbursements of suit.

## ARGUMENT.

We contend that section 121 of the city charter makes no provision for notice of any kind to the property-holders whose property is to be assessed to pay for the construction of sewers and drains, and is void, because it violates that clause of the fourteenth amendment to the constitution of the United States which declares that no state shall deprive any person of life, liberty or property without due process of law.

Our position is authoritatively stated in the case of *Stuart* v. *Palmer*, 74 N. Y. 183. That was a case where the legislature had passed an act providing for opening and grading an avenue, the expenses of which were to be assessed upon the lands benefited by the opening and grading of such avenue, and no provision was made in the act of the legislature for notice to the property-holders whose property was subject to such assessments. Earl, Judge, in delivering the unanimous opinion of the court of appeals in that case, says:

> "I am of opinion that the constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done

under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.

"It must be conceded that property cannot be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard as to the compensation to be awarded him. An act of the legislature arbitrarily taking property for the public good, and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that 'due process of law' which both the federal and state constitutions guarantee to every citizen. Can it be, that when the public takes land for a highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard?

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal or state constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature cannot do nor authorize to be done. 'Due process of law' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature. (*Weimer* v. *Brueinburg*, 30 Mich. 201.)

"This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights.

"It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment.

"It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense as the judgment debtor is deprived of his by the judgment."

Judge Cooley, in his work on Taxation, referring to assessments, on page 266, says:

"We should say that notice of proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law' for these cases; and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment.

"It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard, and it has also been justly observed of taxing officers, that 'it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose without giving any notice to the owner. It is a power liable to great abuse,' and it might safely have been added—it is a power that under such circumstances would be certain to be abused.

"The general principles of law applicable to such tribunals oppose the exercise of any such power. This being the case, it is not to be supposed that the legislature in any doubtful language has undertaken to confer it. All reasonable presumptions in construction should favor justice and right."

Several cases involving the constitutional validity of assessments have been before this court; and in every case, it is believed, the court has affirmed or recognized the doctrine that an act of the legislature providing for an assessment upon real property must also, to be valid, provide for some kind of notice to the property-holder, or an opportunity for him to be heard as to said assessment before it reaches the conclusiveness of a judgment.

*Davidson* v. *New Orleans*, 96 U. S. 97, is a case where an assessment was made upon certain real estate for draining swamps, and the act of the legislature provided that before the assessment became effectual it must be submitted to a court of justice, with notice to the owners of the property. Nevertheless, the act was attacked on the ground that it deprived the person upon whose lands the assessment was made of his property without due process of law. Justice Miller, in delivering the opinion of the court, holds that the act was sufficient in providing for notice to the property-holder, and giving him an opportunity to be heard in the courts as to the assessment; but in the course of his opinion he lays down the following proposition of law:

> "Whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is

appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

*Hagar* v. *Reclamation Dist.*, 111 U. S. 701, was a case in which an assessment was made for reclaiming swamp or overflowed lands upon the property to be benefited by such reclamation. The act of the legislature providing for such assessment also provided for their collection by proceedings in a court of justice, if necessary. Justice Field, in delivering the opinion of the court, held that the provision for collecting the assessment by judicial proceedings was sufficient to sustain the constitutionality of the act. Throughout the opinion, the court recognizes the necessity of some kind of notice to the property-holder to make such an assessment valid. Among other things in the opinion tending to support our position is the following:

"It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Justice Field then refers to certain kinds of taxes where no notice is necessary, such as poll taxes and license taxes, and adds:

"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

*Spencer* v. *Merchant*, 125 U. S. 345, is a case involving the validity of an assessment for improving a street. It was claimed that the act of the legislature providing for such assessment was unconstitutional, because it did not also provide for notice to the property-holders, but this court held that the act did provide for the necessary notice; and upon that point Justice Gray, in delivering the opinion of the court, says:

> "The land-owners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the land owner an opportunity to assail the constitutional validity of the act under which alone an apportionment could be made; and that objection failing, it opened the only other possible questions of the mode and amounts of the apportionment itself."

He further says in his opinion:

> "If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings, upon the question what portion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

And it is to be noticed that in this decision reference is made to the case of *Stuart* v. *Palmer*, 74 N. Y. 183, without any expression of dissatisfaction with the decision in that case.

*Lent* v. *Tillson*, 140 U. S. 316, is a case involving the validity of certain assessments made to widen Dupont street, in the city of San Francisco. The court holds that the act provides for notice to the land-owners, and gives them an opportunity to be heard as to such assessments. It throughout recognizes the duty of the legislature, in passing an act of that kind, to provide for notice to the land-owners whose property was to be affected by such assessment. Justice Harlan, in delivering the opinion of the court, quotes approvingly the above-quoted language from the case of *Spencer* v. *Merchant*.

*Palmer* v. *McMahon*, 133 U. S. 660, is a case where the constitutionality of an act of the legislature assessing taxes upon bank stock came in question. Chief Justice Fuller, delivering the opinion of the court, after reviewing the authorities, states:

> "The imposition of taxes is in its nature administrative, and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value; and opportunity to be heard should be and is given under all just systems of taxation according to value. It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which, and the place where, such complaints may be made."

Several cases have been decided by the circuit courts of the United States involving this and similar questions, notably *The Railroad Tax Cases*, 13 Fed. Rep. 752, in which Mr. Justice

Field, in a very learned and elaborate opinion, discusses this question in all of its phases and in clear and emphatic terms states the law as follows:

> "But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceedings must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding."

*Scott et al* v. *City of Toledo*, 36 Fed. Rep. 385, is a case in which the same question was involved as in this case. Judge Jackson, reviewing at great length all the authorities upon the subject, holds as follows:

> "The second proposition of law submitted on behalf of complainants is: 'May private property be appropriated for public uses, and a charge levied to pay therefor, without affording to the person whose property is to be charged a time, place, or tribunal where he may be heard before the liability for such charge is finally established, and the amount thereof definitely fixed?'

* * * * * * * *

"This subject has been so ably and exhaustively discussed and considered in numerous recent decisions of the federal and state courts that little or nothing remains to be added; nor is it deemed necessary to extend this opinion by quoting at length from those authorities which establish the general proposition that it is essential to the validity of state taxation, other than that of a personal character, such as licenses for privileges, or the exercise of franchises, that the taxpayer shall, at some stage in the proceeding, have notice or an opportunity to be heard; that if such notice is not given, or opportunity afforded to be heard, either in levying or collecting the tax, the proceeding will be wanting in that 'due process of law' necessary to give it validity under the federal constitution. The legislature may prescribe the kind of notice and the mode in which it shall be given, 'but it cannot dispense with all notice.' The owner must in some form, in some tribunal, or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened, before the tax or assessment becomes final and effectual, in order to constitute such procedure 'due process of law.' If the tax or assessment can, under the state law, be enforced or collected only by legal proceedings, in which any and all defenses, going either to the validity or amount of such tax or assessment, may be made, that will afford the opportunity to be heard, and in such cases the proceeding cannot be said to deprive the owner of his property 'without due process of law,' however objectionable or unjust it may be otherwise. In the application of these principles there is no distinction between taxation upon values for general purposes and special assessments based upon benefits. The authorities supporting these propositions are the following: *Kennard* v. *Louisiana*, 92 U. S. 482; *McMillen* v. *Anderson*, 95 U. S. 40-42; *Davidson* v. *New Orleans*, 96 U. S. 104, 105; *Hagar* v. *Reclamation Dist.*, 111 U. S. 707-711, 4 Sup. Ct. Rep. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 335, 336, 6 Sup. Ct. Rep. 57; *Williams* v. *County of Albany*, 122 U. S. 164, 165, 7 Sup. Ct. Rep. 1244; *Spencer* v. *Merchant*, 125 U. S. 354, 355, 358, 361, 8 Sup. Ct. Rep. 921; *Stuart* v. *Palmer*, 74 N. Y. 183; *Railroad Tax Cases*, 13 Fed. Rep. 751-753, 762-766; *County of Santa Clara* v. *Railroad Co.*, 18 Fed. Rep. 410-412, 416-424; Cooley, *Taxation*, 266; Welty, *Assessm.* §§ 250-253, and cases cited.

"In its material facts and principles involved, the present cannot be distinguished from the well-considered case of *Stuart* v. *Palmer*, 74 N. Y. 183, which received the express approval of Mr. Justice Field in *The Railroad Tax Cases*, 13 Fed. Rep. 753, and was recognized by the supreme court as a correct exposition and application of the constitutional provision relating to the taking of private property under the form of assessment 'without due process of law,' in the case of *Spencer* v. *Merchant*, 125 U. S. 351-358, 8 Sup. Ct. Rep. 921. The opinion of Mr. Justice Earl in *Stuart* v. *Palmer* might well be quoted in full, because of its force, clearness, and direct application to the case now under consideration; but, without extending this opinion in making such a quotation, that opinion is specially referred to as sustaining the views expressed and the conclusions herein reached."

Numerous cases have arisen in the state courts involving this or analogous questions and decisions favorable to our position have generally been made.

In *In re Union College*, 29 N. E. Rep. 460, the Court of Appeals of the state of New York uses the following language in its opinion:

"The act of 1886 (chapter 656) again attempts to ratify and confirm the unconstitutional assessments, without curing their inherent defect; and both acts are now sought to be sustained upon the doctrine of *Spencer* v. *Merchant*, 100 N. Y. 585, 3 N. E. Rep. 682, and 125 U. S. 345, 8 Sup. Ct. Rep. 921, as a direct assessment by the legislative authority. That case held that the legislature might fix the aggregate amount of tax to be raised, and the area of assessment upon which it should be imposed, but carefully avoided any ruling that the apportionment of the tax among the persons assessed, which fixes the amounts of the several liabilities, and establishes a charge for which the property is held and may be taken, can also be accomplished without notice or a hearing on the part of the tax-payer. Indeed, the opinions of both courts assume such notice as a necessity, and the reasons therefor are clear and obvious. In fixing the aggregate sum to be raised and the area of property which shall pay it, the legislature determines a public question, and upon considerations of the public interest and welfare. The specific rights of any particular individual are not involved, and until they are he has no right to interfere, except in the general way which is common to every citizen. But when the public questions are settled, and the tax comes to be apportioned, a personal liability of the individual and a lien upon his property are initiated, and he has a right then to be heard upon all the questions which affect and determine that liability. His right is to pay no more than his just proportion, and the legislature cannot arbitrarily determine the amount, refusing to the person assessed a reasonable opportunity to be heard."

*McEneney* v. *Town of Sullivan*, 25 N. E. Rep. 540, is a case in which the constitutional validity of assessments for street improvements comes into question, and the Supreme Court of Indiana says upon that subject:

"Notice at some stage of the proceedings prior to a conclusive judgment is requisite in order to authorize the subjection of property to a special lien for a local assessment. *Paving Co.* v. *Edgerton*, *ante*, 436 (this term); *Kuntz* v. *Sumption*, 117 Ind. 1, 19 N. E. Rep. 474; *Garvin* v. *Daussman*, 114 Ind. 429, 16 N. E. Rep. 826; *Stuart* v. *Palmer*, 74 N. Y. 183; *State* v. *Fond du Lac*, 42 Wis. 287.

"The trend of the decisions of the federal courts is very much in the direction that unless there is notice there is no due process of law within the meaning of the fourteenth amendment, and if that be so, the question has become a federal one, and the decisions of the United States Supreme Court are controlling, and they seem to require notice as an element of due process of law. *Scott* v. *City of Toledo*, 36 Fed. Rep. 385. See authorities, note 2, p. 397. *Elliott, Roads and S.* and note 1, p. 153. But, however this may be, our own decisions and those of many other states, do affirm that notice is essential. As these decisions declare the law, it is the duty of the legislature to provide for some notice, but it is within its power to prescribe what the notice shall be. *Walker* v. *Railroad Co.*, 3 Cush. 1; *Salem* v. *Railroad Co.*, 98 Mass. 431; *Mason* v. *Messenger*, 17 Iowa, 261; *In re Village of Middleton*, 82 N. Y. 196."

We also cite the following authorities as bearing directly upon the issues in this case.

*Jordan* v. *Hyatt*, 3 Barb. 275.
*Wheeler* v. *Mills*, 40 Barb. 644.
*Ireland* v. *City of Rochester*, 51 Barb. 430.
*Griffin* v. *Mixon*, 38 Miss. 424.
*Mulligan* v. *Smith*, 59 Cal. 206.
*Thomas* v. *Gain*, 35 Mich. 164.
*Darling* v. *Gunn*, 50 Ill. 424.
*Gatch* v. *City of Des Moines*, 18 N. W. Rep. 310.
*Patten* v. *Green*, 13 Cal. 325.
*The State* v. *Newark*, 25 N. J. L. 411.
*Same* v. *Same*, 31 N. J. L. 363.
*State* v. *City of Plainfield*, 38 N. J. L. 97.
*State* v. *City of Elizabeth*, 37 N. J. L. 357.

*New York* v. *Rector of Trinity Church*, 17 N. Y. Sup. 510.

*People* v. *Henim*, 19 N. Y. Sup. 488.

Judge Thayer delivered the opinion of the supreme court of the state in this case, and after referring to said section 121 of the city charter, *supra*, says:

"Neither said section 121 nor any other section or clause of the city charter requires any notice to be given to the owner of lots and blocks assessed with a share of the cost of such sewer or drain of the proposed construction thereof."

Referring to the fourteenth amendment to the constitution of the United States, he adds:

"The amendment, therefore, introduces no new principle into the administration of our municipal affairs; it is but declaratory of a rule which has existed beyond the memory of man, and our judicature was built upon it.

"The question has never been, either before or since the adoption of the said amendment, whether the party could be deprived of his property without due process of law, but it has always been whether the act complained of came within that wholesome inhibition.

"The latter inquiry is the one with which we have to deal in this case; it is, whether the construction of said Tanner Creek sewer by the common council of the city of Portland and charging the cost thereof upon the lots and blocks owned by the respondents and others, which are claimed to be benefited by the sewer, without first giving such owners notice of its proposed construction, is depriving them of their property 'without due process of law.'

"The question is one upon which the authorities are not in harmony, though I am satisfied that they largely preponderate in favor of the respondents' side of it; at least, the cases which hold that notice to a party in some form must be given before his property can be charged with a burden, in order that he may have an opportunity to contest the right to impose it, or question the expediency of exercising it, is more in consonance with my idea of justice.

"And the very able opinion of Mr. Justice Earl, in *Stewart* v. *Palmer*, 74 N. Y. 191, 30 Am. Rep. 289, furnishes cogent and convincing logic that a proceeding of the nature and character referred to would operate to deprive the party of property 'without due process of law'; but we cannot conclude that a proceeding under a legislative enactment authorizing a burden to be imposed upon property without requiring notice to be given to the owner would necessarily have the effect mentioned without overruling a former decision of this court."

To justify a decision contrary to the judgment of the court, Judge Thayer refers to the case of

*Strowbridge* v. *City of Portland*, 8 Oregon, 67, as a precedent to be followed. That decision, of course, has no binding effect upon this court, and upon the question involved in this case is not an authority in any court. For, first, the constitutionality of section 121 of the city charter of Portland was not raised, discussed or passed upon by the court; and in the second place, the remark of Judge Boise, who delivered the opinion of the court in 8 Oregon, 67, quoted by Judge Thayer in his opinion in this case, is altogether *obiter*, the fact being that in the Strowbridge case such notice was actually given as ought at least to be provided for in the city charter, and ought to be given in all cases where a sewer is to be constructed and the cost is to be assessed upon the property supposed to be benefited.

Judge Boise states in his opinion in the Strowbridge case that a notice of the proposed sewer improvement was published in the *Daily Standard* newspaper for ten days, and that such notice concluded as follows:

> "The expense thereof (*i. e.* of the sewer construction) to be assessed upon the property benefited thereby. It is hereby understood that the property benefited will include all lots or parts of lots lying within one hundred feet of Yamhill street on either side thereof, and between Front street and the termination thereof."

He further shows in his opinion that a written remonstrance was filed by the owners of two-thirds in value, but not quite two-thirds in area, of all the property adjacent to that part of Yamhill street described in the notice.

Here was a notice distinctly given, to persons whose property was supposed to be benefited by the construction of said sewer, that such a sewer was proposed; thus enabling such persons to show cause, if any, why their property should not be included in an assessment. It further appears that the property-owners acted upon that notice. There was no occasion, therefore, for Judge Boise to say, in that case, that no notice was necessary, and this statement is a mere *dictum* founded upon the provisions of the charter, without any consideration as to the constitutionality of the provisions in question or the right of the state government to take individual property without due process of law.

Judge Thayer, in his opinion, assumes that sewers in the city of Portland have been constructed prior to the decision of the supreme court of the state in this case, upon the faith of the decision in the case of *Strowbridge* v. *City of Portland*, and suggests that some confusion and mischief would result from overruling that decision. But there is nothing in this case to warrant this assumption by the court. It clearly appears that in the Strowbridge case notice was given, and as there is no evidence on the subject one way or the other in this case, we respectfully deny the correctness of this assumption. Moreover, if sewers have been constructed in the city of Portland, and the people have acquiesced in their construction, with or without notice, and have paid their assessments, any decision in this suit would have no effect upon such cases.

Judge Strahan concurs in the opinion of the court upon grounds somewhat different from those given by the majority of the judges for their decision. One suggestion he makes is that the ordinances relating to sewer questions were published in an official newspaper in the city of Portland. But to this it may be answered—first, that there is no law authorizing or requiring the ordinances of Portland to be published in any newspaper, and, therefore, their publication is not a legal notice to any person of what they contain; and in the second place, the publication of ordinance 5068 was simply a notice to certain property-owners that the common council had decided to assess their property for the construction of Tanner Creek sewer. That is to say, if this ordinance was a notice at all, it was a notice given after judgment had been rendered, and is of course of no avail, because the persons notified had no opportunity to be heard as to whether or not their property should be assessed for the construction of the sewer. But there is no allegation or evidence in this case that the ordinances were ever published in a newspaper or otherwise, excepting that they were passed by the common council.

Judge Strahan also refers to the fact that the assessors, in their report to the common council of the city, which is included in ordinance No. 5162, stated that they gave notice of their first stated meeting, on June 25, 1887, at 6:30 p. m., by publishing such notice in the *Daily News*, the official paper of the city, and that at that time they met and proceeded with their work, adjourning from day to day until the final completion of their labors.

Our answer to this suggestion is—first, that no such notice was authorized or required by the city charter; second, that no such notice was authorized or required by any ordinance of the city; third, that it does not appear that this notice was addressed to anybody or that it stated the object for which the assessors held their meeting, or that any persons were advised by such notice that they could appear or be heard at such meeting, or that there was any place of meeting for the assessors fixed in the notice. Nor does it appear whether this notice was given more than one publication. The bill of complaint, which the demurrer admits to be true, alleges that plaintiffs had not, nor had any of them, any notice of these proceedings of the common council, or any opportunity to be heard as to whether or not their property or the property of any of them was or could be benefited by the sewer, or as to the amount that was or should be assessed upon the several parcels of property named in ordinance No. 5162.

We submit, therefore, that the defendants cannot claim that any notice was given to plaintiffs, or any of them, or that the notice referred to in the ordinance is entitled to any consideration.

*State* v. *Elizabeth*, 37 N. J. L. 357.
*State* v. *Newark*, 31 N. J. L. 363.

Judge Strahan further suggests that our remedy was by writ of review, and quotes several decisions from the state of New York in support of this suggestion. But these New York decisions apply to the common law writ of *certiorari*, which writ is abolished in Oregon, what is called a writ of review being substituted therefor.

But there is nothing in this suggestion. Suppose one of the plaintiffs, after discovering that his property was included in the assessment district, as defined in ordinance 5068, had sued out a writ to review the action of the common council in passing this ordinance. To that writ the return could be nothing more than a certified copy of the ordinance, and the inquiry would at once be made by the circuit court: "How can I decide that the plaintiff's property is not properly included within the assessment district, as there is no showing before me on the subject, and the presumption is that the action of the common council in passing the ordinance is what it should be?" And upon this enquiry the writ, of course, would fall to the ground.

But if this same plaintiff had been notified, as he ought to have been, that the common council proposed to include his property in an assessment district for the construction of the Tanner Creek sewer, then he could have made a showing; and if his showing had been overruled by the common council, it is probable that he might have obtained relief by a writ of review: though that is doubtful, under the terms of the city charter of Portland. So that any writ to review the apportionment of the expense of building the sewer among the different property-owners would be of no avail, because such property-owners, having had no notice of the proceedings, had no opportunity to make any showing before the assessor; and without such showing, of course, the decision of the appellate court would be that presumptively the assessments made by the assessors were legal and just to the parties concerned.

But there is a more conclusive answer to this suggestion of Judge Strahan in the fact that section 151 of the city charter provides as follows:

> "In any action, suit or proceeding in any court concerning any assessment of property or levy of taxes authorized by this act, or the collection of such tax or proceeding consequent thereon,

such assessment, levy, consequent proceeding and all proceedings connected therewith, shall be presumed to be regular and duly done or taken, until the contrary is shown; and when any proceeding, matter or thing is, by this act, committed or left to the discretion or judgment of the council, such discretion or judgment, when exercised or declared, is final, and cannot be reviewed or called in question elsewhere."

So that, according to the construction given to the city charter of the city of Portland by the Oregon courts, persons whose property is assessed for the construction of a sewer have no right to any notice of the proposed assessment—no right to any opportunity to be heard upon the subject; and when the proceedings are completed, and a judgment is rendered which the law makes a lien upon their property, the city charter goes further, and denies to such property-owners any right to have the proceedings reviewed in any court of justice.

Judge Strahan is entitled to credit for discovering what was never before known to any person or court—that sections 95, 96, 97, 98 and 99 of the charter provide for a notice to the persons whose property is assessed for the construction of sewers under section 121. These sections refer exclusively to the improvement of streets. Section 95 provides that no improvement of any street shall be made until one-half of the property. owners affected by such improvement shall petition for the same, and thereupon ten days' notice of the contemplated improvement shall be given by publication in some daily newspaper published in the city of Portland. Section 96 provides that the notice must describe with convenient certainty the street or part thereof proposed to be improved. Section 97 provides that if the owners of two-thirds of the property adjacent to such street shall remonstrate against the improvement, it shall thereby be defeated. Section 98 provides that if no remonstrance shall be made the work on the improvement shall proceed. And section 99 provides that the common council may establish said improvement by ordinance within six months after notice has been given as provided in section 95. We quote these sections in full, as follows:

"Sec. 95. No grade or improvement mentioned in section 128 can be undertaken or made without ten days' notice thereof being first given by publication in some daily newspaper published in the city of Portland; but no such notice shall be given until the owners of one-half of the property affected by such improvement shall petition for the same.

"Sec. 96. Such notice must be given by the auditor, by order of the council, and must specify with convenient certainty the street or part thereof proposed to be improved, or of which the grade is proposed to be established or altered, and the kind of improvement which is proposed to be made.

"Sec. 97. Within ten days from the final publication of such notice, the owners of two-thirds of the property adjacent to such street or part thereof, as the case may be, may make and file with the auditor a written remonstrance against the proposed improvement, grade or alteration thereof, and thereupon the same shall not be then further proceeded in or made. And any improvement so defeated by remonstrance shall not be again proposed for six months, except on petition of two-thirds of the property to be affected thereby.

"Sec. 98. If no such remonstrance be made and filed, the council, at its earliest convenience thereafter, and within six months from the final publication of such notice, may establish the proposed grade or alteration thereof, or commence to make the proposed improvement as hereinafter provided.

"Sec. 99. In the case of a notice to establish a grade or alteration thereof, the council, within the time limited by section 98, may establish the same by ordinance, as proposed in the notice."

These sections, it will be seen, are wholly inapplicable to any proceeding for the construction of drains or sewers under section 121. In the steps preliminary to the construction of a sewer, under section 121, no petition is necessary, no remonstrance is allowed, and the property-holders have nothing to say one way or the other; the whole matter being left to the discretion of the common council. The provision in section 121 that the expense of constructing a sewer shall be assessed and collected in the same manner as in the case of street improvements, simply means that the assessment is to be made by the common council or by assessors, as provided in section 121, and that, when so assessed, it is to be collected like other assessments made by the common council; that is to say, if, after the assessment is entered on the judgment lien docket, it is not paid, a warrant is to issue to the marshal to sell the property assessed for the purpose of paying the assessment.

This opinion of Judge Strahan seems to have been prepared in anticipation of an appeal of the case to the Supreme Court of the United States; but we think this court will readily see that it does not answer our contention, that under the charter of the city of Portland the property of a citizen can be taken—and that, in this particular case, an attempt is made to take it—for public use, without compensation therefor or due process of law.

Our understanding is that in the construction of the city charter of Portland, this court will be governed by the decisions of the Supreme Court of Oregon. *(R. R. Co.* v. *Minn.*, 134 U. S. 418.*)* That court holds, in the case of *Strowbridge* v. *The City of Portland*, *supra*, approved in this case, that no notice is provided for and none is necessary to persons whose property is to be assessed for the construction of sewers.

This construction, then, is to be taken by this court as a part of the city charter; and, therefore, the plain question here presented is: Can the real property of a citizen of Portland, Oregon, be constitutionally assessed one hundred or five hundred or a thousand dollars, or any other sum, for the construction of a sewer in that city, and such property, if necessary, be seized and sold to pay such assessment, without any notice to the owner at any stage of the proceedings, or any opportunity given him to be heard before any tribunal or court upon the subject?

A great effort is made by the city attorney in his brief, which he has kindly permitted us to see, to show that section 121 of the charter, constructively or by implication, provides for notice. To this argument we answer as follows:

Sec. 121 provides that when the council shall direct the expense of a sewer to be assessed on the property directly benefited, such expense shall in every other respect be assessed and collected in the same manner as is provided in the case of street assessments. Let it be noticed that this refers exclusively to those sections of the charter which provide for the assessment and collection of assessments for street purposes.

Sec. 95, which is the only section of the charter providing for notice as to street improvements, until after the assessment is fully made and completed, is as follows:

> "No grade or improvement mentioned in section 128 can be undertaken or made without ten days' notice thereof being first given by publication in some daily newspaper published in the city of Portland; but no such notice shall be given until the owners of one-half of the property affected by such improvement shall petition for the same."

To say that this section has anything to do with the assessment and collection of assessments for street purposes is a plain perversion of its language. The notice provided for in section 95 is a notice that the common council of the city proposes to make certain street improvements, and this notice is given to enable persons whose property will be affected by such improvement to remonstrate as provided in section 97. To say that section 121 of the charter, providing for the construction of sewers, includes within its terms these sections or any of them, is an absurdity; for, if that be so, then no sewer can be constructed until the owners of one-half of the property affected by such sewer shall petition for the same, and a remonstrance by the owners of two-thirds of the property adjacent to the proposed sewer will defeat its construction. No one will pretend to claim that any citizen of Portland has any such rights as to the building of sewers. What section 121 does mean is this: That after the assessment for a sewer is made and completed, the council must declare the same by ordinance and direct the clerk to enter it upon the docket of city liens. This docket must show the number of the lot and block and the name of the owner, or that the owner is unknown. (Sec. 104). After such assessment is entered upon the docket of city liens, the common council must make an order that ten days' notice thereof be given by the auditor, by publication in a daily newspaper in the city of Portland; and then, if the assessment is not paid, the council may order a warrant for the collection of the same to be issued by the auditor and directed to the chief of police. The chief of police is to levy upon and sell the lot upon which the assessment is unpaid, and return the warrant, with his doings endorsed thereon, to the city treasurer. And then provision is made that the chief of police shall make a deed to the purchaser. *(Oregon Session Laws, 1882, 168.)*

Reference is made by the city attorney to the notice provided for in section 104 of the charter, as though that had something to do with this question. But the court will see that this notice is to be given after the assessment is made and completed, and is to the effect that unless the person whose property is assessed pays the assessment within a given time, execution will issue and his property will be sold for its payment. Reference is also made by the city attorney to the case of *The King Real Estate Association* v. *City of Portland*, 31 Pac. Rep. 482. But the question now before this court was not considered or decided in that case. The only question before the Oregon court in that case was as to whether the word "may" in said section 121 of the charter was mandatory or permissive; or, in other words, whether the common council was bound to assess the cost of a sewer itself, or whether it might appoint three disinterested persons to estimate the proportion that each person benefited by the sewer was to pay. Nothing was said about notice, and the attention of the court was not called to that subject; and what the city attorney quotes from the opinion relates to the assessment and collection of an assessment after the judgment has been finally rendered, fixing the liability of each lot alleged to be benefited by the sewer, and the amount with which each lot is chargeable under such liability.

Moreover, the question here is whether or not the Supreme Court of the state of Oregon made a correct decision in this case. That court decided that the charter did not make any provision for notice to persons who are to be charged for the expense of constructing a sewer, and that in such case no notice is necessary; and this decision has not been overruled by any argument or illustration in the case of *The King Real Estate*

*Association* v. *City of Portland*, but will stand as the law of the state of Oregon unless it is reversed by this court. There is no alternative. This court must either affirm that decision, and hold that no notice is required and none is necessary to persons whose property is to be charged for the construction of a sewer in the city of Portland, or it must, by a reversal of that decision, decide that notice of some kind is necessary under such circumstances.

Mr. Lewis, in his work on *Eminent Domain*, section 368, after an elaborate review of the authorities, concludes his discussion as follows:

> "There is really but one logical and consistent position in the matter, and that is that a statute that does not provide for notice is invalid."

Another effort of the city attorney is to show that these ordinances numbered 5068 and 5162, referred to in the bill, provide for notice. All the notice provided for by any ordinance of the city of Portland, before the assessment is made and completed, is referred to in section 12 of the ordinance numbered 5068, as follows:

> "Said viewers shall hold stated meetings in the office of the auditor and clerk of said city and all persons interested may appear before said viewers and may be heard in the matter of making said estimate."

Nothing is here said about a notice to anybody. The viewers are not required by the ordinance to give any notice of any of their meetings; no one could determine from the ordinance when the meetings of the viewers would be held; and therefore no opportunity was given to any one by this ordinance to be heard by the viewers. And it will be noticed that this ordinance only allows persons interested to be heard in the matter of *making the estimate;* that is to say, no one has a right to show the viewers that his property is not liable to assessment, but he can only be heard upon the question as to whether the assessment shall be five, fifty or five hundred dollars, or some other sum, which, in effect, is saying that, after a judgment is rendered establishing the liability of a party without any notice, he may be permitted to appear and may be heard as to the amount of damages that shall be adjudged against him. We repeat that there is no law that requires these ordinances to be published, and there is no evidence before this court that they ever were published. The averment in the bill is that plaintiffs had no notice of these proceedings as to the Tanner Creek sewer; and if the viewers did give notice that all persons interested might appear before them and be heard as to the estimates to be made, no one could know from such a notice who was interested in that matter, as it is not pretended that the notice was directed to anybody or was any more than a general notice to the people of the city of Portland. One of the plaintiffs living half a mile or a mile from the proposed sewer would not know, from anything contained in the notice, that he was interested in the construction of the Tanner Creek sewer; but he would know, *as a matter of fact*, that he was not so interested; and therefore, the notice, even if it was all that is claimed for it, would not be any notice to him. We say that it makes no difference, as a matter of fact, whether any notice was given or not. The question here is: Does the charter of the city of Portland provide for a notice, or do these ordinances 5068 and 5162, or either of them, provide for a notice which amounts to a due process of law? If they do not, then they are unconstitutional. This is the only question presented to this court; and this court cannot say that they are constitutional because the city council saw proper to give some sort of notice, such as is referred to in said ordinance 5162. Whether the notice was given or not is a question of fact, to be determined by the courts of Oregon; but whether the laws under which an attempt has been made to collect assessments levied upon the property of plaintiffs is constitutional or not is the question, *and the only question*, before this court. Upon that point we quote the following language, which we think embodies sound law, from the decision in the case of *Garvin* v. *Dausman*, 114 Ind. 429:

"Any proceeding, therefore, the result of which is to deprive the owner of his property, or to impose a burden upon or create a charge against it, and which is carried on under a law which makes no provision for notice and affords the owner no opportunity to be heard concerning the correctness of the assessment, whether the amount charged against him or his property was ascertained and apportioned in good faith and in the manner provided by law, is in contravention of the constitution and lacks the essential element of due process of law."

Another point made by the city attorney is that section 121 of the charter is constitutional, because under it the common council *has power* to provide for a notice as to the construction of sewers. That the council has such power under this section is undoubtedly true; but it is equally true that the city council may, under such section, construct sewers and assess and sell the property of persons in the city of Portland for the expense of such construction, without any notice to the owners of the property until after the assessment is made and completed, and all opportunity for objection by such owners is at an end.

Our contention is, that whenever the legislature delegates to a municipality, or a board of commissioners, or any other subordinate tribunal, the power to impose, for a public improvement, a special liability upon the property of a citizen, through which he may be divested of his title to that property, the delegation of such power must be accompanied by a requirement that such municipality, board of commissioners, or tribunal, must give either actual or constructive notice to the owner whose property is to be subjected to such liability, so that he may have an opportunity to show that his property is lawfully exempt from any liability for the proposed improvement.

Whenever a municipality, board of commissioners, or tribunal, has acquired jurisdiction by virtue of a sufficient notice, then its right to exercise its discretion arises; but these bodies to which the power of making special assessments is delegated can no more acquire jurisdiction to make such assessment without notice, than a court can acquire jurisdiction to render a judgment against a defendant without any notice of the pendency of the suit in which such judgment is rendered. Some *dicta* may be found in some of the decisions which seem to support the position of the city attorney. But it seems to us that it would be an unsound and an unsafe doctrine to say that these municipalities and boards which are invested by the legislature with the power to deprive a person of his property, may proceed to accomplish that end without giving notice to anybody, unless in the exercise of their judgment they think proper to do so; that is, that they can, if they choose, notify their friends and withhold notice, if they see proper, from other persons.

We think there is a wide difference between the power of a legislative assembly and that of a municipal government. All legislative power possessed by the people of a state can be exercised by the representatives of such people in a state legislature, excepting so far as it is restricted by the provisions of the state constitution. But a municipal government can only exercise such powers as are expressly or by necessary implication delegated to it by the legislative assembly; and whenever such municipal government transcends the power so delegated, its acts are void.

Now, the legislative assembly of Oregon has not delegated to the city government of Portland an unlimited power to construct sewers and impose expenses upon the inhabitants or any number of the inhabitants of the city of Portland; but the power to assess property for sewer purposes is expressly restricted to an assessment upon those who are directly benefited by the sewer. Any assessment, therefore, for sewer purposes by the city of Portland upon persons not expressly benefited by such sewer is illegal and void. The action of the city council in deciding what parcels of property shall be liable to pay for the construction of the sewer is in its nature judicial, because it necessarily involves the examination of evidence; and, therefore, such action, if taken without notice to the owners of the property, is unconstitutional and void. To say that the common council of the city shall not assess for the construction of a sewer any property not specially benefited thereby, and then deny to property-owners the right to show that their property will not in any way be benefited by such sewer, and therefore ought not to be taxed for its construction, is a mockery and a fraud. What is the use of providing a limitation upon the assessing power of the common council as to sewers if nobody has a right to insist upon and enforce such limitation?

We have examined the authorities referred to by the city attorney, but do not propose to review them in detail. Suffice it to say that most of them are inapplicable to the questions involved in this case, and that most of the extracts made by the city attorney from the opinions of the courts are arguments of the judges and not decisions. All of the decisions referred to by the city attorney hold, with possibly one or two exceptions, that in case of a special assessment a notice to the owner of the property upon which the assessment is to be levied is necessary. But the cases in 33 Kansas, 84 Virginia and 13 Rhode Island seem to hold that it is not necessary that the statute of the state authorizing such assessments must provide for notice in order to be constitutional. It will be observed that these courts admit that there is a large number of very respectable authorities against their views, and they try to find some excuse for their decisions in some law or decision of a local character. In the Massachusetts cases, the city ordinance provided for a notice in writing to the property-owners and also for a public notice; and, besides, the statute of the state gave the right of appeal from the decision by the city authorities to the courts of the state. 63 Mass. 242.

Several of the cases cited by the city attorney are decisions adverse to his position, notably the cases of *Gatch* v. *City of Des Moines*, 63 Iowa, 718; *Dubuque* v. *Wattoon*, 28 Iowa, 571; *State* v. *Newark*, 25 N. J. Law, 425; *Railroad Co.* v. *Minnesota*, 134 U. S. 418.

Upon examination, it will be found that in most of the cases relied upon by the city attorney there was some remedy left to the property-owner, after the assessment was made, for an illegal or unjust assessment, such as an appeal to a court or a proceeding to have the assessment confirmed by a judicial tribunal upon notice to the property-owner; but in this case the charter expressly denies to the property-owner any right to have any action of the city council involving the exercise of its discretion reviewed by any tribunal or in any court.

The city attorney quotes largely from the case of *Williams* v. *City of Detroit*, 2 Mich. 561; but the court in that case expressly says that it stands upon a principle entirely different from cases where the assessments are made for public improvements for any supposed benefits that would result therefrom to the property of the individuals assessed. And in this connection we ask the attention of the court to the case of *Thomas* v. *Gain*, 35 Mich. 164, where the statute did not provide for notice and the assessment was held invalid.

Chief-Justice Agnew, in *Reed* v. *Erie*, 79 Penn. St. 353, concludes a very able opinion relative to this subject with the following remarks, which are quite appropriate to this case:

> "The power (of special assessments) has become flagrant, often engulfing the entire value of the property of small holders. If the little all of men of moderate means can be taken to gratify a taste for expensive improvements or the mere desires of the wealthy, or to fill the ravenous maws of contractors and public jobbers on the pretence of public right, such persons had better flee from large towns or cities to places of safety far away from their oppressors."

And again he says, in another case:

> "Laws which cast the burden of the public on a few individuals, no matter what the pretence or how seeming their analogy to constitutional enactments, are in their essence despotic and tyrannical; and it becomes the judiciary to stand firmly by the fundamental law in defense of those

general, great, and essential principles of liberty and free government, for the establishment and perpetuation of which the constitution itself was ordained." 69 Penn. St. 364.

We respectfully submit that this question ought to be put at rest in an emphatic decision by this court. It is a vital and far-reaching question, and seems not to be so fully settled as it should be. Municipal corporations are multiplying indefinitely in all parts of the United States. Towns of only a few hundred inhabitants are everywhere being incorporated as cities. City governments are proverbial for their reckless extravagance in the expenditure of money. They are more or less influenced, and sometimes controlled, by selfish partisans and unscrupulous jobbers. City taxation and assessments in some cases approach the confiscation of private property. Under these circumstances, the citizen cannot be too carefully protected. The spirit of the constitution and the claims of justice will never be fully recognized till the citizen has personal notice served upon him, or public notice equivalent thereto, of every proceeding in which he may be divested of life, liberty or property.

GEO. H. WILLIAMS,
*Of Counsel for plaintiffs in error.*

WILLIAMS & WOOD,
*Attorneys for plaintiffs in error.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1892.

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JOHAN PAULS~~O~~EN, A. ALFREDS, J. J. ALLARD, ALFRED ANDERSON ET AL., Plaintiffs in Error.

VS.

THE CITY OF PORTLAND, JOHN GATES, MAYOR ET AL., Defendants in Error.

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**In Error to the Supreme Court of the State of Oregon.**

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## BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

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WM. T. MUIR,
City Attorney, for the Defendants in Error.

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PORTLAND, OREGON:
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## BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

### STATEMENT.

This suit was instituted for the purpose of enjoining the collection of certain assessments levied against the property of the plaintiffs in error, by the defendant in error, the city of Portland, to defray the cost of the construction of a sewer within the limits of said city.

The cause was finally submitted on demurrer to the amended complaint, and judgment rendered by the supreme court of the state of Oregon dismissing the bill, upholding the action of the city and affirming the validity of the assessments. From this judgment the plaintiffs have prosecuted a writ of error to this court.

An examination of the records will disclose the fact that a number of objections were urged against the validity of the proceedings, all of which were passed upon and disposed of by the supreme court of Oregon.

The discussion in this court, as we take it, must be confined to the points suggested in the assignment of errors. There are two of these :

First—It is claimed that the section of the city charter, under which the proceedings culminating in the levying of the assessments aforesaid, were conducted, is unconstitutional and void because repugnant to the fourteenth amendment to the federal constitution.

Second—It is urged that the ordinances enacted by said city in reference to the same matter are also void because in violation of the amendment to the constitution of the United States before mentioned.

For the purposes of this argument it will not be necessary to go into close detail of the allegations of the bill of complaint. It contains proper averments of ownership of the property charged with the different assessments, and sets out facts sufficient to disclose equitable jurisdiction.

The first assignment of error brings up the question of the validity of that portion of the enactment of the legislative assembly of Oregon incorporating the city of Portland, which refers to the construction of sewers and the levying of assessments to defray the cost thereof. Section 121 reads: "The council shall have the power to lay down all necessary sewers, and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer, but the mode of apportioning estimated costs of improvement of streets prescribed in sections 112 and 113 of chapter 18 of this act, shall not apply to the construction of such sewers and drains; and when the council shall direct the same to be assessed on the property directly benefited, such expense shall, in every other respect, be assessed and collected in the same manner as is provided in the case of street improvements; *Provided,* that the council may at its discretion appoint three disinterested persons to estimate the proportionate share of the cost of such sewer or drain to be assessed to the several owners of the property benefited thereby; and in the construction of any sewer or drain the city shall have the right to use and divert from their natural course any and all creeks or streams running through the city into such sewer or drain."

Laws of Oregon, Session 1882, p. 171.

The section above quoted refers to chapter *18* of the act. This is a clerical error—there is no chapter 18. It means chapter 10. This is clearly shown inasmuch as said chapter 10 provides "the mode of apportioning estimated costs of improvement of streets" and also contains "sections 112 and 113" referred to. The wording of said section 121 suggests a question of statutory construction which will hereafter be adverted to. It is not necessary for the proper presentation of our views in the direction just indicated, to insert the whole of chapter 10 in this brief. At this point we refer to sections 94, 95, 96, 97, 98, 100 et seq.

Laws of Oregon, Session 1882, p. 166 et seq.

We also wish to call attention to three other sections of the chapter—section 3 of chapter 2 reads: "The power and authority given to the municipal corporation of the city of Portland by this act is vested in a Mayor and a common council and their successors in office, to be exercised in the manner hereinafter prescribed."

Subdivision 40 of section 37 is as follows: The council has power within the city of Portland (see beginning of section 37), "To exercise such power and authority as may be given to the council in this act."

Laws of Oregon, Session 1882, p. 154

Section 44, Id. p. 155, reads: "Upon the passage of any ordinance, the enrolled copy thereof, attested by the Auditor shall be submitted to the Mayor by the Auditor, and if the Mayor approve the same, he shall write upon it 'approved,' with the date thereof and sign it with his name of office, and thereupon unless otherwise provided therein such ordinance shall become a law and be of force and effect."

In reference to the ordinances of the said city, deemed by plaintiff to be unconstitutional and void, the bill contains the following averments. "Said ordinance numbered 5068, approved March 5th, 1887 is unconstitutional and void, in this: Section 121 of chapter 10 of the charter of said city of Portland providing for the construction of sewers, under and by virtue of which said ordinance numbered 5068 was passed, is in violation of the 14th amendment to the constitution of the United States, as it provides for the taking of property for public use without due process of law; and said ordinance numbered 5068 is also unconstitutional and void, as it determines arbitrarily and absolutely that the property therein described is benefited by said Tanner creek sewer without giving to the owners of said property any notice or opportunity to be heard upon that question. Said ordinance numbered 5162 approved August 19th, 1887, is unconstitutional and void upon the same grounds as those upon which said ordinance numbered 5068 is unconstitutional and void as aforesaid, and also because said ordinance numbered 5162 provides for an assessment of the property therein named for the construction of said Tanner creek sewer without providing for any notice to the owners whose property is therein and thereby assessed."

Said ordinances and each of them and said assessment were and are unconstitutional, illegal and void because—and these plaintiffs aver the facts to be as now stated—plaintiffs had not nor had any of them any notice of said proceedings of said common council or any opportunity to be heard as to whether or not their property, or the property of any of them, was or could be benefited by said sewer, or as to the amount that was or should be assessed upon the several parcels of property named in said ordinance numbered 5162. * * *

Record, pp. 17-18.

" Said assessment is illegal and void, and in violation of section 121, of chapter 10, of the charter of said city of Portland, and these plaintiffs aver the fact to be that said assessment was not made upon the property directly benefited by said sewer, but was made indiscriminately upon a large section of the city of Portland and without reference to the benefits to the property therein contained."

Record, pp. 18.

Ordinance numbered 5068, referred to, states with exactness the character, size and dimensions of the sewer to be constructed, and specifically indicates its termini and course.

Record, p. 20-21.

Section 5 of the same ordinance provides: "The streets and property within the district bounded and described as follows, shall be sewered and drained into the Willamette river through the sewer in this ordinance provided and ordered to be constructed along Tanner creek and North Eighth street, from B street, near the intersection of North Fourteenth street to the Willamette river, to-wit:

[Here follows a particular description of the district containing the land to be charged with the cost of the sewer.]

This ordinance continues: "And as the lots and blocks, and parts of lots and blocks included within said district as above defined will be drained and sewered both by surface drainage and underground sewerage, by and through the sewer in this ordinance to be located, constructed and put down, the said lots and blocks and parts of lots and blocks aforesaid, are hereby declared to be directly benefited by such sewer and subject to assessment therefor, in proportion to the benefits received thereby, as provided in section 121 of the city charter of said city."

Record, p. 22.

Section 12. "That R. L. Durham, Chas. G. Schram and H. W. Monastes, disinterested persons, be and they are hereby appointed viewers to estimate the proportionate share of the cost of said sewer to be assessed to the several owners of property benefited thereby, in accordance with the provisions of section 121 of the charter of said city, and report the same to the common council within sixty (60) days from the date of the approval of this ordinance by the Mayor. *Said viewers shall hold stated meetings in the office of the Auditor and Clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimate.*" (Italics ours.)

Record, p. 24.

The essential features of the report of the assessors are shown by the portions of ordinance No. 5162 which are made a part of the record.

Omitting the title and ordaining clause the ordinance reads :

Section 1. The common council of the city of Portland, having by ordinance No. 5068 provided for the construction of a sewer, * * * *

And having therein and thereby appointed three disinterested freeholders, viz., R. L. Durham, H. W. Monastes and Chas. G. Schram, to estimate the proportionate share of the cost of such sewer to be assessed to the several owners of the property benefited thereby, and said assessors having made their report to the common council, which report, being satisfactory, is hereby adopted, said report being in words and figures following, to-wit :

*To the Honorable Common Council of the City of Portland.*

*Gentlemen :* The undersigned, appointed by your honorable body to assess the cost of constructing a brick sewer along Tanner creek, * * * * as provided by ordinance No. 5068, would respectfully beg leave to submit this our report.

*We met at the office of the Auditor and Clerk* and were furnished with the plans, specifications and contract, from which we have ascertained the probable cost to be $35,652.20, thirty-five thousand six hundred and fifty-two and 20-100 dollars.

In accordance with the *requirements of said ordinance, No. 5068, we gave notice of our first stated meeting June 25, 1887, at 6:30 o'clock p. m., by* (*publication of such notice in the Daily News, the official paper of the city*), *at which time we met and proceeded with our work, adjourning from day to day until the final completion of our labors.* We have assessed the cost of constructing said sewer to the several lots, parts of lots and tracts of land included within the boundaries defined by you in your ordinance No. 5068, in the several amounts as shown by the following tabulated statement." ("Omitted by stipulation.") (Italics ours.)

"Section 2. The Auditor and Clerk is hereby directed to enter a statement of the assessment hereby made in the docket of city liens, and cause notice thereof to be published in the manner provided by the city charter."

The ordinances were regularly authenticated, approved and signed.

## ARGUMENT.

The court will consider only federal questions.

> Davidson vs. New Orleans, 96 U. S., 97; Lent vs. Tillson, 140 U. S., 334.

All others have been determined.

> Paulson et al. vs. City of Portland, 16 Or., 450.

The statute in itself satisfies the requirements of the fourteenth amendment to the federal constitution, inasmuch as it expressly directs the giving of notice.

We are compelled to explain at the outset that our views are at variance with those expressed in the principal opinion rendered by the supreme court of Oregon in this case. As we read the opinion written by Chief Justice Thayer, it holds that the charter does not provide for any notice. Opposing counsel insist that this court must be governed by that opinion, and argue that inasmuch as the decision named expressly holds no notice is provided for, the only question here is, can the property of a citizen be taken without notice? In that portion of the opinion recorded on page 452, 16 Oregon Reports, it is said: " Neither said section 121, nor any other section or clause of the city charter, requires any notice to the owner of lots or blocks assessed with a share of the cost of such sewer or drain of the proposed construction thereof." This language indicates that in the mind of the writer no notice is expressly provided for by the act of incorporation. That the statute itself does not upon its face and in terms direct notice to be given. Judge Strahan, in his opinion rendered in overruling the petition for rehearing, disagrees with his associate upon this proposition.

On page 464 of that same report it is said: "sections 95, 96, 97, 98, 99 of the charter all provide for and regulate notice in case of improvement of streets"; and section 121, which authorizes sewers, provides, among other things, "and when the council shall direct the same (costs) to be assessed on the property directly benefited, such expense shall in every other respect *be assessed and collected in the same manner as is provided* *in the case of street assessments.*" The charter expressly provides for notice in the case of street assessments, and section 121 makes the provisions applicable in case of sewers where the expense is ordered by the council to be made a charge on the property directly benefited." It would be very difficult to say upon a comparison of these two opinions what the ruling of the supreme court of Oregon really is. Two opinions in the same case, each of the same force, and each construing the same statute, are directly opposed to each other. Counsel on the other side claim Judge Thayer's opinion to be the law. With equal propriety we can make the same claim for Judge Strahan's opinion. This controversy, however, is unprofitable. The matter has been laid at rest by the case of the King Real Estate Association et al. vs. The City of Portland, decided by the supreme court of Oregon on November 21st, 1892. (31 Pac. Rep., 482). In the latter case the only question was whether the common council had the power under section 121 of the charter (Oregon Laws, Session 1891, p. 826), to make the apportionment of the cost of the construction of a sewer upon the property directly benefited, or whether it was necessary to appoint three disinterested persons assessors for that purpose.

The argument on behalf of the plaintiff was that the words "may at its discretion," as used in said section 121, were equivalent in meaning to a command directing the council to appoint the assessors. We contended, on behalf of the defendant, that the law conferred an alternative power, claiming that the reference contained in said section 121 to the prior sections governing the method of apportioning the cost of street improvements, with the exception of the two sections particularly exempted, had the effect of embodying the law relative to street improvements, so far as applicable to sewers, in section 121. The court so held, and used the following language: "The provision that such expense shall be assessed in the same manner as is provided in the case of street improvements necessarily makes such sections in regard to street improvements, with the exception noted, a part of section 121 for that purpose. To ascertain, then, how such expense for the construction of sewers or drains shall be assessed, we must turn to those sections. Section 100 provides the manner of determining the cost of street improvements. It declares: "The council may proceed to ascertain and determine the probable cost of making such improvement and assess upon each lot or parcel thereof its proportionate share of such cost."

By this section it is plain the council has the power to apportion and assess the cost of street improvements, and as it is made to apply as a part of section 121 the council has the power to apportion and assess the cost of sewers or drains, with the exception noted. After making these provisions, then follows the proviso, "that the council may at its discretion appoint three disinterested persons to estimate the proportionate share of the cost of such sewers," etc., thereby showing, when section 121 is considered as a whole, that the council has the authority to apportion and assess the cost of constructing sewers or drains upon the property directly benefited, or in the exercise of its discretion the council may appoint three disinterested persons to apportion such cost in its stead."

The court will observe that the laws of 1891 and the laws of 1882 are identical so far as they relate to the improvement of streets, the construction of sewers, and the assessments to be levied to meet the expense thereof. The effect of the decision in King vs. The City of Portland, is to embody all of the provisions of chapter 10 of the charter relative to street improvements, with the exception~~s~~ of sections 112 and 113, which, being inapplicable, are expressly excluded by the terms of the law, into section 121. It can not be contended with any show of reason that the decision last cited has the effect of including section 100 in section 121, but does not operate in a similar manner upon section 95. Section 95 upon its face refers to grades and street improvements. Section 100 taken alone apparently refers to street improvements only. But, by general reference in section 121 all of the sections of chapter 10 pertinent to the improvement of streets are held to be a part of said section 121. The question before the court in King vs. The City of Portland concerned only the manner of making the apportionment, and of course, nothing else is decided. The court however says: "The provision that such expense shall be assessed in the same manner as is provided in case of street improvements necessarily makes such sections in regard to street improvements, with the exceptions noted, a part of section 121 for that purpose." The "exceptions noted" are sections 112 and 113. Section 95 expressly provides for preliminary notice. This would seem to be conclusive upon this court. The able counsel upon the other side say in their brief, "Our understanding is that in the construction of the city charter of Portland this court will be governed by the decision of the supreme court of Oregon. That court holds in the case of Strowbridge vs. The City of Portland, supra, approved in this case, that no notice is provided for and none is necessary to persons whose property is to be assessed for the construction of sewers." We have the same information concerning the rule of this court. Chicago and Milwaukee Ry. Co. vs. Minnesota 134 U. S. 456. Hagar vs. Reclamation Dist. 111 U. S. 704. Lent vs. Tillson 140 U. S. 316-328-329-334.

We are of the opinion, however, that the court will consider itself bound by the latest adjudication. The case of Strowbridge vs. The City of Portland, holding that no notice is provided for, is overruled by the decision rendered thirteen years later, declaring that the law expressly provides for notice. If it is contended that the decision here being reviewed is the law of the case, and that this court can not consider any other adjudication of the Oregon court upon the same statute, we offset Judge Thayer's opinion with the one delivered by Judge Strahan, and advance the claim that the opinion of the latter judge is sanctioned and made the law of Oregon by the later case of King vs. The City of Portland, *supra*.

It is the settled law of this, and every court, that statutes will not be held unconstitutional and void when, by any fair method of reasoning, they can be upheld. We think an application of this undoubted rule to the statute in question, considered with reference to the Oregon decisions, will cause the court to render its decision in our favor.

No harm can befall an individual whose property is liable to assessment and involuntary alienation, when the highest court of the state in which the property is located declares that the law provides for notice, and hence notice must be given.

One further point in this connection. By the system of reasoning in King vs. The City of Portland (supra), section 104 of the charter is also embodied in section 121. That section requires notice to be given before an assessment can be collected. It is as follows : "A sum of money assessed for the improvement of a street can not be collected until, by order of the council, ten days' notice thereof is given by the Auditor by publication in a daily newspaper published in the city of Portland. Such notice must substantially contain the matters required to be entered in the docket of city liens concerning such assessment."

Laws of Oregon, session 1882, p. 168.

We are not satisfied that this section fulfills the constitutional requirement. It provides for notice after the assessment is complete. If the case of McMillen vs. Anderson, 95 U. S. 41, applies it would appear to be sufficient. The notice designated is not a notice of sale, but is a notice of the assessment. The sale is made upon warrant issued not less than fifteen days after the date of the first publication of the notice named. And then as property under execution, which requires further notice. (Sec. 107, p. 168, Laws 1882).

The case of McMillen vs. Anderson (supra) referred to a license tax. In the matter of notice that case is identical with this, except here a further notice is required before sale. We submit this phase of the case to the court without further comment.

The second point we desire to urge upon the attention of the court is one which especially commends itself to our judgment; and, for the purposes of the argument to follow, we will admit that the charter does not expressly provide for giving notice. Placed in the form of a proposition, our idea is this :

When the law-making power of a state invests a municipal corporation with authority to legislate, through its common council, upon matters of local concern, and delegates to such municipal corporation, through its common council, the power "to lay down all necessary sewers and drains, and to cause the same to be assessed on the property directly benefited by such drain or sewer" such a municipality has the power, under its legislative authority, to pass ordinances requiring notice to be given to individuals whose property is sought to be charged with the burden of a sewer assessment; and that due notice, given pursuant to such ordinances, is as effectual and valid as it would be if given by the direct command of the state legislature.

We have no dispute with the counsel on the other side concerning the necessity of giving notice to a person whose property is to be affected by a proceeding which may ultimately result in the involuntary conveyance thereof. We admit there must be due process of law. We differ, however, very seriously as to what constitutes "due process of law."

The legislatures of the different states frequently enact laws appointing commissioners, whose duty it is to do certain things towards the improvement of the districts defined in the acts. In such cases authority is generally conferred upon the commissioners named—if the taxes levied are not paid, to carry on proceedings which eventually result in the sale of real property for the purpose of realizing the amount of assessments levied against it. We do not concede, even in such cases, that the law must, *on its face*, provide for notice to the individual whose property is to be, or may be, taken. It will be argued later on that commissioners of the kind named, as well as assessors appointed by the governing body of a city, act judicially, and have the authority to give valid notice without being expressly directed so to do. The law implies that notice shall be given. The question to be considered in each individual case is one of substance, and not of technicality. The inquiry is, "Did the parties have notice from an authoritative source?" and not, "Does the law in terms provide for notice?" But, however this may be, the important distinction now to be noted is that such commissioners have no powers of legislation. The case of a municipal corporation is essentially different. It acts under an authority delegated by the lawmaking power of the state. It may pass all laws necessary to effectuate the purposes of its creation, and to carry out the powers of government bestowed upon it by the legislature. All ordinances properly passed by its legislative body have the force of law, within the limits of the municipality, so long as they do not contravene its constitution or any law of the state or United States. 1. Dillon on Mun. Corp., 4th Ed., Sec. 39; 1. Dillon on Mun. Corp. (4th Ed.), Sec. 308, n. 1.

In the city of Portland this is rendered true by express enactment. Section 44, chapter 6, Session Laws of Oregon, 1882, reads: "Upon the passage of any ordinance, the enrolled copy thereof, attested by the Auditor, shall be submitted to the Mayor by the Auditor, and if the Mayor approve the same, he shall write upon it "approved," with the date thereof, and sign it with his name of office, and thereupon, unless otherwise provided therein, such ordinance shall become a law and be of force and effect. And further, sub. 40 of section 37 gives the council express authority "to exercise such power and authority as may be given to the council in this act."

The legislature has the undoubted right to delegate to local public corporations the necessary powers of legislation. If the legislature, in addition to giving the city power to lay down all necessary sewers and drains, had directed the particular manner in which this end should be accomplished, and had designated the precise steps to be taken for the purpose of charging property benefited with its proportion of the burden of the cost, it would then have been necessary to strictly follow each requirement. In such a case the common council would have had no discretion. The legislature has not seen fit to appoint the details of an assessment to meet the expense of a sewer constructed. The power is broadly given, "to lay down all necessary sewers and drains and cause the same to be assessed upon the property directly benefited by such drain or sewer." Everything is here left to the discretion of the common council. It has the power, and it becomes the duty of that body, to decide when and where sewers are necessary; the kind and size of the sewer, and all details of construction; it is left to the common council to determine what district will be benefited by the building of the proposed sewer; it must decide the proportionate amount each lot or part thereof within the defined district will be benefited, or appoint assessors for that purpose; it must proceed in a manner consistent with other sections of the constitution under which it acts to take the steps necessary to charge the property assessed with valid liens; it must act under other sections of the same instrument in order to effect a sale of the property assessed when the tax becomes delinquent. None of these things, so absolutely essential to the exercise of the power granted in the lines above quoted, are provided for in detail. Can it be seriously said that the city may do all these things, yet it cannot provide for the giving of the notice demanded by the constitution? If so, the legislature, when it enacted that "The council shall have power to lay down all necessary sewers and drains and cause the same to be assessed upon the property directly benefited by such drain or sewer" failed in its purpose, and the city of Portland is powerless to provide a system of sewerage absolutely necessary to the preservation of the health of its population. If it has not the power under this section and subdivision 40 of section 37, it does not possess it. We think said subdivision 40 expressly gives the council authority to do all things necessary to carry out every granted power. The theory of the charter is that the cost of all local improvements shall be paid by the property benefited. The law has restricted the right of the city to levy a general tax to a sum scarcely adequate for the purposes of general government. We would be willing to submit this phase of the case without producing authority to support it, except that which is found in the oft repeated principle that municipal corporations possess such powers as are expressly given them, and such as may be implied, because essential to carry into effect those which are expressly granted.

> Ottawa vs. Carey, 108 U. S., 110; ex parte Burnett, 30 Ala., 461; Des Moines Gas Co. vs. Des Moines, 44 Iowa, 505.

While we think the power to provide for notice is necessarily implied under section 121, yet we claim before the court, as before stated, that subdivision 40 of section 37 expressly gives authority to do every act essential to a complete and effectual performance of the grants directly made. In this respect our case is stronger than many of those now to be cited.

There are many adjudications in point. In the case of Gilmore vs. Hentig, 33 Kans., 156, it is said: "Where a statute authorizes a city to provide for the construction of sewers and drains, and to tax the costs thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, *held*, that such failure to require notice does not render the statute unconstitutional or void; but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same." And further: "Where the only notice given in such a case was by the passage of two ordinances levying the taxes, and the publication of such ordinances and a notice for two days in the official newspaper of the city, and the ordinances were indefinite as to the notice given by them, and the special notice gave nothing more than a right to the property owners to contest the *valuation* of their lots, held that the notice given by the ordinances and the special notice may be sufficient to render the taxes valid, except for substantial reasons, but for such reasons the taxes may be void or voidable." A copy of the law then under consideration is inserted on page 165 of the decision. See also p. 170 *et seq.* Affirmed in Newman vs. City of Emporia, 41 Kans., 586. In the cases of the City of Pueblo vs. Robinson, 12 Colo., 593-598, and Edgerton vs. Town of Green Cove, etc., 19 Fla., 140-142, statutes similar to the one under consideration here were upheld. And the rule for which we contend is stated in The State vs. Newark, 25, N. J. L., 399, 426. The case of Bedard vs. Hall et al., 44 Ills., 91, is directly in point. On page 92 in the statement of facts it is said "that the report of these commissioners was filed with the city clerk, and *notice* given as required by the *ordinance.*" This seems to have been the only notice provided for, or given. The decision of the supreme court of Indiana in City of Fort Wayne et al. vs. Cody, 43 Ind., 198 is in point. The charter provision which formed the basis of that case, is the same in effect as section 121 of chapter 10 of the Portland charter. No notice is provided for. A general grant of authority only is given. See page 199 of the case last named. The case of the City of Dubuque vs. Wooten, 28 Iowa, 571, *et seq.*, is much in point. In that case the *ordinance* passed by the city council provided that the resolution of the council levying the tax should be published for two weeks in the official paper of the city. The provision of the charter of the city of Dubuque under which the ordinance was passed was general in its character. It reads: "The city may levy a special tax on any lot or lots, or the owner thereof, on any alley, street or highway, or any part thereof, for the purpose of grading, paving or macadamizing the same, or for the purpose of grading, paving or curbing the sidewalks, and may collect the same under such regulations as may be prescribed by ordinance." It is true the charter named gave the city power to collect assessments "under such regulations as may be prescribed by ordinance," thereby expressly conferring a broad discretion upon that body. This would not seem to affect the question before this court, nor does it aid opposing counsel in their contention that the law—i. e., the statute—must provide for notice. The statute says nothing about notice. It is *implied* that notice should be given. The same implication necessarily results when a city is given authority to make an improvement and assess the cost thereof upon the property directly benefited. There can be no object in levying an assessment if, when levied, it cannot be collected, and the tax cannot be collected unless notice is given.

Besides, subdivision 40 of section 37 of the Portland charter confers authority upon the council to do all things necessary to carry out every granted power.

In Gatch vs. The City of Des Moines, 63 Iowa, 718, a case concerning a sewer assessment, no notice was required, either by the statute or ordinance. On p. 726 the court says: "The conclusion which we have reached in this case involves important interests, inasmuch as there are other assessments for taxation authorized by law to be affected by it. In view of this we deem it proper to say that we do not determine that cities may not make a valid assessment under the law, as it now is, without amendment. The law does not provide for notice to be given to the owner, but it does not follow that, by reason of this omission in the laws, a city council or other board of officers authorized to assess property for taxation, may not, by ordinance or otherwise, provide for some notice of the assessment to be given, that the owner of the property may appear and show cause why the assessment should not be binding and conclusive upon him. All that he can require is that he shall have an opportunity at some time to be heard in the matter before the assessment attaches and becomes a lien upon his property."

State vs. The Mayor and Common Council of Jersey City, 24 N. J. L. 662, is a street improvement case. The act failed to provide for notice to the owners of property affected. The court says on p. 666: "It is obviously proper that they (the commissioners) should hear the parties interested ; and I think such parties, if accessible by reasonable diligence, are entitled to notice of the time and place of their meeting to fulfil their duties. *This is not in terms required by the act*, but it is a general principle of law of too much importance to be overlooked, that no person shall be bound by proceedings of a judicial nature, affecting his person or property without having an opportunity of being heard."

In the case of Cleveland et al. vs. Benjamin Tripp, City Treasurer of the City of Providence, 13 R. I. 51, in speaking of a law authorizing the construction of sewers it is held "That it (the law) was not unconstitutional because it contained no provisions for notice to the owners of assessed realty."

In Davis vs. City of Lynchburg, 84 Va., 861, the court held the following: "A city charter providing that whenever a street is opened, etc., the city council may apportion the expense between the city and the owners of real estate benefited thereby, and direct that their share of the expense be collected as city taxes, etc., is not repugnant to the 14th amendment United States constitution, in that it contains no provision for the party affected to appear and contest the proceeding."

In B. & O. Railroad Company vs. The P. W. & Ky. Railroad Co., 17 W. Va., 812-835, this language is used: "The statute has omitted to provide that notice of the application for condemnation shall be given to the land owner before the viewers are appointed to ascertain a just compensation for the land, but does it follow that the owner is not entitled to such notice, and is not allowed to appear and show, if he can, that the applicant has no lawful right to take the land from him? This is not the construction to be given such a statute. Where a statute authorizes a legal proceeding against any one, and does *not expressly provide for notice to be given*, it is implied that an opportunity shall be afforded him to appear in defense of his rights unless the contrary clearly appears." (Citing numerous authorities.)

We also desire to attract the attention of the court to the case of Hitchcock vs. Galveston, 96 U. S., 341-348. It appears from the portion of the statute noted in the course of that decision, that the power given to the city of Galveston, by the legislature, over sewer and other improvements, was similar to the authority conferred upon the city of Portland by section 121 of chapter 10 of its charter. The act is partially quoted on page 348 of the decision, and is in the following words: "The cost of the construction of sidewalks shall be defrayed by the owners of the lot, or part of lot or block, fronting on the sidewalk, and the cost of any sidewalk constructed by the city shall be collected, if necessary, by the sale of the lot, or part of lot or block on which it fronts, together with the cost of collection, *in such manner as the city council may, by ordinance, provide;* and a sale of any lot, or part of lot or block, to enforce collection of cost of sidewalks, shall convey a good title to the purchaser," etc. The statute was not attacked on the ground of unconstitutionality. The court expressed no opinion upon the questions prominent in the case now before the bar.

The citation is serviceable for the purpose of showing the novelty of plaintiff's claim. The statute is silent upon the question of notice, and yet it provides for the sale of private property without the consent of the owner.

The precise point in controversy here was directly decided in Barker vs. City of Omaha, 16 Neb., 269-270-271. The court, in the course of its opinion, says: "The principal ground upon which relief is sought is because the city charter in force when the tax was levied contained no provision for notice to the property owner. There is no doubt that notice of some kind must be given to a property owner, and an opportunity given to him to be heard before an assessment upon his property becomes finally and irrevocably fixed."

And that the notice should be provided for in the statute, *or ordinance*, authorizing the improvement there is no doubt."

The supreme court of Massachusetts lends the weight of its authority in aid of our controversy. In the case of Hildreth vs. City of Lowell, 77 Mass., 345, it is held that "A statute authorizing the city council of a city to 'cause drains and common sewers to be laid down through any street or private lands paying the owners thereof such damage as they may sustain thereby,' is constitutional and valid;" and further, "A city *ordinance* which requires the city council, before laying out a drain across private property, to 'give notice in writing to the several owners' of the property, appointing a time and place for hearing all parties interested, and to post two more copies of such notice at public places in the city, is complied with by serving notice upon all known owners personally or at their usual place of abode, and publicly posting two copies thereof, and therein describing the premises as a passage way, without adding that they are private property.'' In this case the statute conferred a general grant of power. The city made the necessary provision for notice by general ordinance applying equally to all cases of sewer construction. The committee appointed by the council gave the notice required by the ordinance. Upon direct attack the action of the city was upheld. On page 351 of the decision it is said: ''The city council, considering, and rightly considering, it (the law) to be a perfectly valid enactment, proceeded, by the establishment and adoption of suitable by-laws and ordinances, to determine the manner and circumstances in and under which it might be availed of. *By these ordinances it was provided and directed* that before a drain or common sewer should be located or established through private lands, *notice in writing* should be given to the owners of the land through which it should be laid.'' (Italics ours.)

In Wright vs. Boston, 63 Mass., 233, 234, a sewer was constructed under a law which did not require notice. The city council made proper provision.

The case of Brooks et al. vs. Mayor and City Council of Baltimore, 48 Md., 265, is strongly analagous to the present case, and is an authority in point. The city charter conferred power upon the mayor and council to make street improvements and provided, in the discretion of the council, for a special assessment in connection therewith. The act further directed the city authorities to make provision for an appeal from the assessment, which was done. This decision illustrates the nature of the functions of a city council. It affords another example of the legislative powers exercised by such bodies, and further demonstrates that, in the opinion of the Maryland court, a city council has the power under a general delegation of authority to pass the laws necessary to carry out the intention of the legislature as expressed in the general enactment. The appeal authorized gives the property holder his day in court. It serves the office of prior notice. If a city council may provide for an appeal, and establish the rules under which it may be taken, under a general grant of power authorizing it to do so, the same body could provide for prior notice under a general authority permitting this to be done; and if such a council may provide for notice under a general authority granted, it certainly possesses the implied power to pass ordinances requiring the giving of notice, when it is absolutely necessary to do this in order to accomplish a particular thing expressly authorized by its charter.

Upon this special point of the legislative authority of a city council, acting under a city charter granted by a state legislature, we invite the attention of the court to Saxton vs. Beach and wife, 50 Mo., 489, where, in speaking of a certain amendment to the city charter relative to the improvement of streets, it is said: "The amendment contemplates legislation upon the part of the city government to give the authority. The city council by itself can not legislate, but it must act in conjunction with the mayor; * * * neither can act alone, but both must unite to produce a valid law."

There is one other decision we wish to cite upon the proposition now being discussed. It is Williams vs. Mayor, etc., of Detroit, 2 Mich., 561, 575, 576. The question before the court concerned the validity of a special street assessment. Apparently the law was one granting general power to improve streets and to levy assessments to pay the cost. No provision was made for notice. On pages 574 *et seq.* the court says: "The power to raise funds for defraying the expenses of paving streets, by assessment on owners and occupants, is conferred upon the common council by the 20th section of the city charter, in very general terms. The mode of proceeding in making the assessment; the designation of the officer who shall prepare the assessment roll; *the notice* to be given to the persons proposed to be assessed; the time and opportunity for making objections by those interested, and the manner of reviewing and establishing the assessment, are all left to the sound discretion and judgment of the common council. It became necessary, therefore, for the common council, after directing in which of the modes authorized by the charter the necessary funds should be provided for such purpose, to prescribe the mode of procedure to be pursued in carrying into effect the power so granted. For this purpose they passed, and caused to be promulgated, certain ordinances, prescribing the several steps to be taken, in order to perfect the assessment and enforce its collection. These ordinances, it is insisted, if authorized by the charter, are binding upon the common council and its officers, and constitute the law by which the assessment must be regulated. * * * * * "The common council, in making general ordinances, exercises a legislative power. The making of an assessment roll and apportioning a tax under the ordinance is a ministerial duty, and the confirmation of the assessment partakes more of the character of a judicial than of a legislative act. We must therefore regard the ordinances relating to assessments as binding and obligatory upon the corporation as upon the individual citizens."

"We have no doubt that the common council had power under the charter to make ordinances for carrying into effect its powers in relation to assessments." * * * * * "It is very apparent that many of the powers conferred by the charter of the city of Detroit could never be exercised if the corporation had no power to make ordinances or by-laws, except in the cases specially provided for in the act of incorporation. *A corporation has an implied power to make* by-laws, unlesss expressly or impliedly restrained from doing so; and whether it is so restrained must be determined from an examination of the charter itself." (Italics ours). This case seems fully to cover the present one. The reasoning of the decision is clear, convincing, and, we believe, sound in law. Fifteen of the states of the Union agree upon the proposition. While this court has not, to our knowledge, directly passed upon the question, we think the doctrine established here is in accord with the direct decisions of the state courts.

*Section 121 of the charter is a grant of power to a local government, which may be exercised or not according to the will of that government. The charter permits sewers to be constructed and the cost thereof to be charged upon the property directly benefited. Legislation is necessary before the power can be utilized. The ordinances are the laws directing the improvements to be made, and hence the laws do direct notice to be given.*

Having exhibited, as best we could, the state of the law upon the most important, and, it seems to us, conclusive, question in this case, it will be proper at this time to note what was really done in the way of giving notice of the proceedings out of which this litigation arises.

Section 12 of ordinance No. 5068, providing the time and manner of constructing a sewer, etc., is as follows: "That R. L. Durham, Charles G. Schram and H. W. Monastes, disinterested persons, be and they are hereby appointed viewers to estimate the proportionate share of the cost of said sewer to be assessed to the several owners of property benefited thereby, in accordance with the provisions of section 121 of the charter of said city, and report the same to the common council within sixty (60) days from the date of the approval of this ordinance by the mayor. *Said viewers shall hold stated meetings in the office of the auditor and clerk of said city, and all persons interested may appear before said viewers and be heard in the matter of making said estimate.*"

Record, p. 24.

This is the ordinance by which we claim the common council directed notice to be given. It commands that the viewers shall hold "*stated meetings*;" it provides the *place*, to-wit, the office of the auditor and clerk, which is a public place and known to every inhabitant of the city; and it expressly states that "all persons interested may appear before said viewers and may be heard in the matter of making said estimate." It will be remembered also that said ordinance numbered 5068 explicitly described the district affected, by metes and bounds, so that any one might know whether his property was included within the taxing district.

The viewers beyond doubt considered that the ordinance appointing them enjoined upon them the duty of giving notice, and acting under this direction, gave notice of their meeting. The notice actually given by them must certainly be of record. The complaint does not show it, nor is there any allegation concerning it. The only information given by the bill of complaint is that contained in the recitals embodied in ordinance No.

5162 adopting the report of the viewers. The copy of the viewers' report inserted, presumably, *verbatim* in the ordinance, is as follows: "*We met at the office of the auditor and clerk* and were *furnished with the plans, specifications* and contract, from which we have ascertained the probable cost to be $35,652.20, thirty-five thousand six hundred and fifty-two and 20-100 dollars."

"*In accordance with the requirements of said ordinance No. 5068 we gave notice of our first stated meeting June 25th, 1887, at 6:30 o'clock P. M. (by publication of such notice in the Daily News, the official paper of the city), at which time we met and proceeded with our work, adjourning from day to day until the final completion of our labors.*"

The viewers report that they met at the office of the auditor and clerk, and, in accordance with the requirements of ordinance No. 5068, gave notice of their first stated meeting, on June 25th, 1887, at 6:30 o'clock P. M. Ordinance No. 5068 states that the viewers must meet in the office of the auditor and clerk. Their report shows that they met at that place, and further shows that they gave notice "in accordance with the requirements of said ordinance No. 5068 of our first stated meeting." This language is not susceptible of a double interpretation. They were directed to meet at the office of the auditor and clerk; they so met, and gave notice of such meeting (stating the time), as required by the ordinance; that is, of their meeting at the office named. It is further shown that the viewers adjourned from day to day until their labors were finally completed. So the fact is there was a properly constituted board deliberating daily upon the problem of this assessment for a considerable length of time, and the board of assessors, as well as the common council, had, prior to their first meeting, extended a general invitation to all interested to appear before the board and present their claims.

It is true the ordinance does not prescribe the kind of notice. Counsel on the other side may say it does not require any notice. We have no hesitancy in asserting that the language employed clearly devolved upon the viewers the duty of giving notice. Without doing so they could not perform their functions in the manner designated by the law. After directing them to hold "stated meetings,"at a specified place,it is provided that all persons may appear and be heard in the matter of making the estimate. The ordinance requires the viewers to hold "stated meetings", or, in other words, settled, established, regular meetings, at times appointed by themselves, at a certain place, for the purpose of hearing and determining questions associated with the discharge of their defined duties. No person could be heard without being present. It is unreasonable to suppose that anyone could be present without having first received notice to appear. The ordinance contemplates a hearing of interested parties at regularly appointed meetings. It can not be successfully claimed that the viewers could, under the ordinance named, have arrived at a secret understanding among themselves as to the times when the meetings should be held. Such an arrangement would have been in violation of the ordinance, because the manifest intent of the latter was to have interested parties appear before the board at such meetings as it might appoint. If proper and public notice had not been given by the viewers they would have failed in the performance of their duty, and their acts would have been invalid. The ordinance provides that all interested parties should be heard. The constitution requires no more.

The ordinance might have been made more explicit. The idea prevailing in the minds of the law makers might have been expressed with more exactness and clearness. However this may be, the meaning and intention is certain, and was correctly interpreted by the viewers. The ordinance furnishes another example of the infirmities so often apparent in legislative enactments. It is not void on that account. We apprehend the court will engage in an endeavor to ascertain the meaning of the law, and if it can fairly be said to be sufficient in substance it will so hold. The universal principle invoked in matters of this kind is that the court will direct its efforts in an attempt to uphold the law, and endeavor to fairly and justly expound it. The legal cunning often displayed by counsel before the bar is unobjectionable. It is never mistaken, however, for judicial wisdom. Counsel may "stick in the bark;" the court will not. It is very easy to say that the word "notice" does not occur in the ordinance. A casual glance discloses that fact. A close survey of the entire provision shows a fixed and expressed intention that notice should be given. The intention controls. This construction is corroborated by the action of the viewers at the time; necessarily follows from the right given to be heard, and is consistent with the general principle that the legislature is presumed to act with reference to the established law.

Upon this point Judge Strahan, in his opinion heretofore referred to, made the following statement: "I think it would be a reasonable construction of this ordinance to hold that notice shall be given, and if this be so, the ordinance does provide for notice by necessary implication. That which is implied in a statute is as much a part of it as what is expressed." Upon this point see also, Lewis on Eminent Domain, §368, and cases cited, note 1. In Whiteford vs. Probate Judge, 53 Mich., 130, 133, 134, it is said: "Such notice is always necessary where it is sought to deprive the citizen of his property; and if the notice is not expressly provided for in the law itself, it is in all such cases necessarily implied, and the failure to give such notice rendered the proceedings, if otherwise regular, null and void." This is the law of Oregon. Minard vs. Douglas County, 9 Or., 206, *210*. The court says: "This much plainly appears—that the authority of the petitioners to give the notice is as effectually supplied by intendment as though it had been given in express words—that which is implied in a statute is as much a part of it as what is expressed."

The ordinance in this case clearly authorizes the board of viewers to give notice. The notice given by them was given by authority of law.

Further, as shown by the foregoing decisions, the law of Oregon is that this ordinance provides for notice by necessary implication, and that this implication, flowing directly from the language used, is as much a part of the law as it would be if directly expressed. It is admitted by all parties here concerned that this court will be governed by the decisions of the supreme court of Oregon upon matters of statutory construction. If it is so guided the point just presented must be decided in our favor.

We have not been able to discover any provision in the city charter requiring ordinances to be published. There is no more reason for publishing the ordinances of a city, unless the charter so directs, than there is for publishing the enactments of a state legislature. Upon the question of notice we do not rely upon the publication of the ordinance directing the construction of the sewer and defining the taxing district. That is a legislative act. It is the law under which the sewer was constructed, and it directed that notice should be given. No notice of this ordinance was necessary in any view of the case. The inhabitants of a municipality are charged with notice of the local laws.

> Palmyra vs. Marton, 25 Mo., 593; Dubuque vs. Wooten, 28 Iowa, 571-2-3-4; Murphy vs. Louisville, 9 Bush., 189; Walker vs. Toledo, 18 Ohio St., 452.

Counsel on the other side appear to labor under the impression that the notice given by the assessors was not notice to anybody or of anything. This position is unjustified. The notice published was specific. It announced the time, place and purpose of the meeting. It was given to all parties interested. The ordinance appointing the assessors defined the district. The inhabitants of the city were charged with knowledge of this law. It is to be presumed, as long as the notice was actually given, that it was properly given. The court will not adjudge the proceedings void upon the unsupported assertion of counsel attacking it. The statement has additional force when it is considered that counsel could have shown precisely what the notice was if they had so desired.

The city council, acting in the exercise of its legislative powers, could properly define the assessment district.

Lent vs. Tillson, 140 U. S., 317-325; Spencer vs. Merchant, 125 U. S., 355.

Notice by publication is sufficient.

Lent vs. Tillson, 140 U. S., 325.

The bill of complaint alleges that none of the plaintiffs had any notice of the proceedings of the common council or any opportunity to be heard as to whether or not their property would be benefited by such sewer, or as to the amount that was or should be assessed upon the several parcels of property named in ordinance No. 5162. We submit that this allegation states a legal conclusion and is not admitted by the demurrer. The facts regarding notice are shown by the complaint and especially by the ordinances appended. The averment is tantamount to a statement on behalf of the pleader that, conceding the facts shown to be true, no legal notice was given, because the notice actually given was not legal notice. That is the question before the court.

Inasmuch as notice was actually given, we believe the proceedings would have been valid even if the charter and ordinances had all been silent upon the matter of notice.

The law is settled now that individuals who are appointed to distribute the cost of a local improvement over the different parcels of land benefited thereby, act judicially. It is said in Hagar vs. Reclamation District, 111 U. S., 710, that where a "tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially," etc. We apprehend the same rule would apply when the officers are appointed to assess the value of benefits accruing to land by reason of an improvement. There is probably no necessity at this day to cite authorities upon this point. The effect of the appointment of the assessors in this case was to constitute a judicial tribunal. We concede, for the purpose of this argument, that neither the statute nor the ordinances provided for notice. It would seem to us to be the intendment of the law that the instrument chosen to effectuate its object should be invested with all necessary authority. We hesitate to accept the doctrine preached by the other side that the constitution requires the law to specify the kind of notice to be given. The constitution itself does not say so. It provides in general terms, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law," etc. What is "due process of law" is a judicial question. The courts have wisely declined to define the phrase. Each case must rest upon its own merit.

Mr. Justice Miller, in delivering the opinion of the court in Davidson vs. New Orleans, 96 U. S., 104, 105, said: "That whenever by the laws of a state, or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, whether it is for the whole state, or of some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, *with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case*, the judgment in such proceeding can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." We are aware that some of the leading decisions upon this question apparently hold that the law must in some way direct notice to be given. *No notice was given in any of those cases.* Notwithstanding this and notwithstanding our claim that the *ordinances are the laws* within the meaning of the decided cases, we wish to present the point, under the particular circumstances of this case, for decision. As long as the law undoubtedly is that the property of an individual can not be taken without affording him an opportunity to be heard, there would seem to be no danger of injustice being done. And we can see no reason why a person should complain if he has been in fact given such notice, and such opportunity to be heard, as would, if such notice had been given by command of the statute, satisfy opposing counsel's notion of the constitutional guaranty. It would seem to us that the constitution does not require more than that a person should be given his day in court, and if he is called into court to represent his interests in an appropriate proceeding, and in a manner provided by the court itself, this ought to be sufficient in substance. No satisfactory reason is apparent to our mind why a court, having jurisdiction over the subject matter, can not establish the rules necessary to bring parties before it. A person may complain if no notice is given him. He can not prescribe the kind of notice, he can not insist upon its being given in a particular manner, nor can he designate the source from which the notice shall come. The rule would furnish the guide in the matter of giving notice, and of course would have to be followed.

Chase vs. Hathaway, 14 Mass., 221-223, et seq.; Bostwick vs. Isbell, 41 Conn., 305-6-7-8; Eddy vs. The People, 15 Ills., 386-7-8; Balto. & Ohio R. R. Co. vs. P. W. & Ky. Ry. Co., 17 W. Va., 812 835; Gilmore vs. Hentig, 33 Kans., 156; Gatch vs. The City of Des Moines, 63 Iowa, 718; State vs. Mayor, etc., 24 N. J. L., 662.

There is a broad difference between notice gained by a party from extraneous circumstances, and notice given him by the tribunal appointed to pass judgment upon his rights.

There would seem to be no room to doubt this last proposition, when the law establishing the judicial tribunal clearly evinces an intention requiring the giving of notice. In such case the court could not legally act without first complying with the law, by giving the requisite notice.

To our knowledge there is no case which can be held to be an authority against our main contention—the proceedings were appropriate to the nature of the case; the common council acted strictly within the powers conferred upon it by the legislature, and took no step unwarranted by the general law; the assessors acted systematically and deliberately, and after due notice given; all parties interested were invited to participate and to represent their separate interests. If this is not due process of law the decision announcing that conclusion will form a startling precedent. It would be dangerous to relax any vigilance in maintaining the full integrity of every constitutional guaranty. It may be remarked, however, that the constitution was framed to protect the citizen, not to enable him to evade the payment of his just debts, or his fair proportion of authorized taxation.

Respectfully submitted,

WM. T. MUIR,
City Attorney, for the Defendants in Error.

Portland, Oregon, Dec. 29, 1892.